84-630

Office-Supreme Court, U.S.
FILED
OCT 16 1984
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

LINDSEY MC INNES,

Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS**

PETITION FOR WRIT OF CERTIORARI

JOHN MATTIONI, COUNSEL OF RECORD
DANTE MATTIONI
FRANCIS X. KELLY
MATTIONI, MATTIONI & MATTIONI, LTD.
Suite 200, 330 Market Street East
Philadelphia, PA 19106
(215) 629-1600

NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

LINDSEY MC INNES,

Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS**

PETITION FOR WRIT OF CERTIORARI

JOHN MATTIONI, COUNSEL OF RECORD
DANTE MATTIONI
FRANCIS X. KELLY
MATTIONI, MATTIONI & MATTIONI, LTD.
Suite 200, 330 Market Street East
Philadelphia, PA 19106
(215) 629-1600

QUESTION PRESENTED FOR REVIEW

Whether plaintiff-petitioner was denied his privilege as a citizen of the United States and due process and equal protection of the law when, in a court of the State of Texas, regional and ethnic slurs were made against his attorneys because they were from the North and of Italian descent, and his attorneys were throughout the trial accused of fabricating the case and being liars and cheats, and the finality of the judgment against plaintiff has been left to stand by the Appellate Courts of Texas even though the defense at trial was based on concealed evidence, the Court of Appeals of Texas itself dealing a seeming geographical slur against plaintiff's attorneys?

TABLE OF CONTENTS AND TABLE OF CASES

Page

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF CASES.....iii

REPORTS OF OPINIONS BELOW.....v

STATEMENT OF JURISDICTION.....vi

CONSTITUTIONAL PROVISION.....vii

STATEMENT OF CASE.....1

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTIONS RAISED.....5

ARGUMENT.....9

APPENDIX

OPINION OF TEXAS COURT OF APPEALS.....1a

OPINION OF TEXAS SUPREME COURT...36a

MOTION FOR REHEARING DENIED.....57a

RESPONDENT'S OPENING ARGUMENT....58a

RESPONDENT'S CLOSING ARGUMENT....75a

TABLE OF CASES

Page

Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, (1978).....21

Chambers v. B & O R.R. Co., 207 U.S. 142 (1907).....21

Corfield v. Coryell, 6 F.Cas. 546 No. 3230 (E.D. Pa. 1823)..21

Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).....28

Hosey v. Club Van Cortlandt, 299 F.Supp. 501 (S.D.N.Y. 1969).....28

Lee v. Habib, 424 F.2d 896 (D.C. Cir. 1970).....27

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982).....27

McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983).....27

McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230 (1934).....20

Miller v. State of North Carolina, 583 F.2d 701 (4th Cir. 1978).....23

Mosley v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir. 1981).....27

Otis Elevator Co. v. Wood, 436 S.W.2d 324 (Tex. 1968).....23

Potashnick v. Port City Construction Co.,
609 F.2d 1101 (5th Cir. 1980).....25

Skuy v. United States,
261 F. 316 (8th Cir. 1919).....24

Standard Fire Ins. Co. v. Reese,
584 S.W.2d 835 (Tex. 1979).....23

United States v. Grunberger,
431 F.2d 1062 (2d Cir. 1970).....24

United States v. McKendrick,
350 F.Supp. 990 (S.D.N.Y. 1972), 481
F.2d 152 (2d Cir. 1973).....22

Woddell v. Charter Oak Fire Ins. Co.,
473 S.W.2d 660 (Tex. Civ. App. 1971)...23

REPORTS OF OPINIONS IN COURTS BELOW

The Opinion of the Court of Appeals of the Thirteenth Supreme Judicial District of Texas, Corpus Christi (Number 13-82-138-CV) is reported at 659 S.W.2d 704.

The Opinion of the Texas Supreme Court (C-2579) is reported at 673 S.W.2d 185.

STATEMENT OF JURISDICTION

Judgment was entered by the Supreme Court of Texas on June 20, 1984 and a Rehearing was denied July 18, 1984.

This petition is brought pursuant to 28 U.S.C. 1257(3) which states that:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court...where any title, right, privilege or immunity is specially set up or claimed under the Constitution..."

CONSTITUTIONAL PROVISION

AMENDMENT 14

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This is a products liability suit brought in the name of the now deceased Lindsey McInnes who was rendered a quadriplegic when his Yamaha motorcycle went out of control and crashed over a highway guardrail in Corpus Christi, Texas on November 2, 1974 (1216, 1219). Plaintiff died December 26, 1983 at the age of 63.

On October 29, 1976 plaintiff McInnes filed suit against defendant Yamaha Motor Corp., U.S.A.

The case went to trial on June 8, 1981 in the 214th District Court of Nueces County, Texas, Judge Norman Utter presiding. On June 26, 1981, the jury rendered a verdict, finding that the Yamaha motorcycle was defective in the design of the frame and that Yamaha had failed to give adequate warnings of the

dangers, but that the defects in the motorcycle were not a producing cause of the occurrence. The jury separately found that the motorcycle did not develop an uncontrolled "wobble" immediately prior to plaintiff's injury and that plaintiff failed to keep a proper lookout on the occasion in question.

Plaintiff's motions for new trial and/or judgment n.o.v. were overruled by a new Judge, Steven Fieldcamp.

The Court of Appeals of the Thirteenth Supreme Judicial District of Texas, Corpus Christi (Number 13-82-138-CV) affirmed on September 1, 1983. It found three errors: that Dr. Joseph Rupp, Medical Examiner for Nueces County, had been permitted to speculate concerning the level of alcohol in plaintiff's blood at the time of the accident circa 5 p.m. based upon a notation in the hospital record later on that plaintiff was

"slightly intoxicated"; that the deposition of Leo Lake, resident testifier for Yamaha, should have been admitted in which Lake had finally admitted a wobble could occur at a low speed of 30 mph; and that the trial judge erred in restricting complaints of wobble over 40 mph to notice alone and not for causation. However, the Court believed the first two errors were not reversible and sua sponte found curiously that plaintiff had acquiesced in the third error.

On June 20, 1984, the Supreme Court of Texas (C-2579) affirmed the Court of Appeals. A Motion for Rehearing was denied on July 18, 1984. It agreed that Dr. Rupp's testimony was improperly admitted and that the deposition of Leo Lake, resident testifier for Yamaha, should have been admitted in which Lake had finally admitted a wobble could occur at a low speed of 30 mph; it also found that the

testimony of plaintiff's daughter (that her father communicated to her two days after the accident by eye-blink method that the cycle had forced him off the road) should have been admitted to combat the charge of recent fabrication. However, it concluded that the errors as to Dr. Rupp and plaintiff's daughter were harmless and sua sponte disregarded the error as to Lake because his testimony was not read in camera to the judge even though offered. It considered the question of the admissibility of any evidence on alcohol but reached no decision, claiming that plaintiff had waived any objection by reference to same even though the trial court refused to rule on the issue of admissibility. The Texas Supreme Court elected to consider only these four points of error. It refused to consider the ethnic and geographic slurs visited upon plaintiff's counsel.

STAGE IN PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED

A. In his Brief to the Court of Appeals, plaintiff at p. 53 argued that the repeated, prejudicial side-bar comments, personal and ethnic slurs, appeals to regional bias and prejudice, by defendant's counsel deprived plaintiff of a fair trial; that the extremely offensive references to plaintiff's out-of-state counsel in final argument simply cannot be tolerated in a court of law, nor a verdict in such a tainted proceeding be allowed to stand (p. 60) and referred to Koufakis v. Carvel, 425 F.2d 892, 900-905 (2d Cir. 1970) where the introduction of incisive epithets such as Mafia was deemed inconsistent with the Constitutional right to a fair trial even apart from objection.

The Court of Appeals said that an objection had not been made at trial. The Court itself chose instead to give

plaintiff's counsel a seeming regional slur.

B. At page 29 of his Brief to the Supreme Court, plaintiff alleged that the manner of references to Philadelphia lawyers was a highly improper appeal to regional basis and prejudice. At pages 31, 32, plaintiff argued that out-of-state attorneys are entitled to be treated with dignity and respect in a Texas courtroom and their clients to an even-handed application of justice in the courts of this State, that the Mafia comment disparaging plaintiff's lawyer simply cannot be tolerated in a court of law, nor should a verdict in such a tainted proceeding be allowed to stand, that defendant's counsel had used the term "woppy" to express bigotry. At page 34, plaintiff argued that the slurs "Mafia" and "woppy" were personal slurs equivalent to an appeal to racial prejudice and were

similar to those referred to in Koufakis v. Carvel, 425 F.2d 892, 900-905 (2d Cir. 1970) where the introduction of incisive epithets such as Mafia was deemed inconsistent with the Constitutional right to a fair trial even apart from objection. However, the Texas Supreme Court refused to consider this point of error.

In the letter brief to the Texas Supreme Court on the Motion for Rehearing, trial counsel asked the Supreme Court to consider the points of error dealing with the denial of due process visited upon plaintiff by the discovery coverup engaged in by defendant and the purposeful concealing of evidence which indicated clearly the bike would wobble at low speed at corners, the circumstances of plaintiff's accident. He again asked that the Court hear the point of error dealing with the geographical and ethnic slurs since they concern the Due Process and Privileges and Immunities clauses.

The Supreme Court of Texas refused to consider this point of error, although at oral argument it asked defendant's counsel how he had pronounced "woppy" at trial.

ARGUMENT FOR ALLOWANCE OF WRIT

A. RELEVANT FACTS

Plaintiff, a domiciliary of Connecticut (Trial Transcript 1216), had purchased his Yamaha TX 650 motorcycle in late 1973 in Philadelphia, Pennsylvania. The cycle had about 19,000 miles on it when, on November 2, 1974, at about 2:00 p.m., plaintiff took it to a Yamaha shop in Corpus Christi where he was temporarily residing (2192). While routine maintenance was being performed and a tire replaced, plaintiff went to a club next door, had a few short beers, shot pool and ate some chips. He was in the club a little over an hour, then left and picked up his motorcycle at about 4:00 p.m. (1219, 1223-4, 1278, 1282, 1301, 1311, 1348).

Plaintiff started home down Highway 286. About fifteen to twenty minutes

later, the accident occurred as he encountered an uphill grade and a curve where the highway split into Interstate Highway 37. Plaintiff testified he had slowed to between 30 and 40 mph when his cycle started to wobble or shimmy. Hubert Smith, the only eyewitness who was driving a car behind the plaintiff, testified plaintiff was driving very well before the mishap (56-58; 64-5, 69; 1287-32; 1284-5; 1288; 1326-7; 2213).

An expert Randy Nelson testified that his examination of the McInnes bike had revealed the classic wobble marks on the front tire and fork stops (1361-70; 1385; 1407).

The trial centered exclusively on causation. Despite a massive pre-trial coverup of Yamaha's records, the leaks in the coverup were sufficient to convince all that the frame was weak and would cause the cycle to wobble.

Defendant produced no evidence to controvert the overwhelming proof that the frame was defective in design and that Yamaha knew of the defect. Instead, defendant elected to contest causation, its counsel claiming the bike would not wobble at a low speed of 40 mph and that the wobble defect would have manifested itself earlier in the life of the cycle and, thus, that plaintiff's drinking had to be the cause of the accident.

After the trial, Judge Fieldcamp ordered produced certain documents defendant had sealed when they were produced at the deposition of the resident testifier, Leo Lake, on May 11, 1981 and which the Court did not order produced before trial despite plaintiff's Motion (XI, 5-64).

This evidence consisted of test results showing that striations on the road surface tended to induce wobbles in

the 650 motorcycle and at lower speeds, especially around curves and that this tendency was actually enhanced by greater mileage on the motorcycle, all the circumstances of plaintiff's mishap.

In other words, at trial defendant employed the fruits of cover-up as its defense. Defendant was able to argue that the accident was not caused by the defect only because it was permitted to avoid positive proof from its own records and tests to the contrary. Whereas defendant's counsel kept up a cult-like incantation that the bike could not wobble at less than 40 mph, he knew that the documents brought into the deposition room on May 11, 1981 were to the contrary. Lake also finally admitted at deposition on May 28 that the bike could wobble at 30 mph but the Supreme Court excluded this deposition although offered to be read into evidence consistent with local rules

by the plaintiff, because the deposition was considered by the judge in camera and not read into the record after the judge held the evidence inadmissible.

Amos Gardlin testified at the trial. He had formerly been employed at Yamaha and his job had been precisely to handle complaints about the 650 wobble. When he suggested publishing the defect or a recall, he was threatened (1036-37, 1054, 1086-87, 1907-9). Gardlin testified that Yamaha not only covered up the defective frame, but actually decided to make more 650s to save face (1081).

Nonetheless, throughout the trial, defendant's counsel impugned the integrity of plaintiff's counsel and hurled regional and ethnic slurs.

At voir dire and in his opening statement, defendant's counsel accused plaintiff's lawyer of suggesting the whole story to the plaintiff who, defendant's

counsel claimed, had no memory of the accident.

> "The evidence will show that McInnes was unfamiliar with the area, unfamiliar that he needed to make a right angle turn, unaware that his motorcycle shimmied for years, until he decided to sue the Yamaha people. and suddenly remembered that." (III, 5, 6).
>
> "He continuously told his doctors that he had no memory of the accident, and two years to the day after the accident, sues the Yamaha Motor Corporation...he remembers he drove along at 30 miles an hour, and suddenly without warning he had this terrible wobble." (IV, 29).
>
> "everybody that testified lied for them." (2587).
>
> "They're trying to steal money from us." (2601-2).
>
> "It is contrived, and it is made up, and I don't like it. My friend Tony (Fletcher, plaintiff's local counsel), we'll go fishing next week. I'm not mad at him. You can see what he has had to do with this. Nothing. But they [Philadelphia counsel] made that up. I don't know how they got Smith to change that much. I don't know how they got Mr.

Consumer to come in here and say that they bought his motorcycle back and all this other stuff." (2622).

"You have watched them work. By the time Hubert Smith got on the stand, you caught them cheating you." (2590).

"If you think that they are trying to pull the wool over your eyes, then you don't have to believe anything they have brought you. I have tried to show you that they are so." (2602, 2603).

Defendant's counsel caricatured plaintiff's counsel as a carpetbagger:

"He reaches in his little sack of Philadelphia tricks...I wonder if he thinks that you haven't ever caught him...He says that I think that he has contrived some of this lawsuit, and I'll stand behind that statement that he has made and I will agree that I think he has." (2582).

"They put that man on knowing that he had not been his observation and had not been his experience and had not been his belief, and represented to you under oath while they sat around and read four more days of wobble, wobble, that that was true. Just bull. Just bull." (2607).

There were explicit appeals to regionalism:

> "I don't care where you're from or where you get your evidence from, I don't think you can come to Corpus Christi, whether you are a Philadelphia lawyer or who you are." (2601).

An appeal to regionalism evidenced itself in the questioning of plaintiff's actuarial expert:

> "Okay. There are actuaries in Texas, are there not? I mean, a body would not have to go to Philadelphia to find an actuary?" (1658).

> "Okay. What I'm suggesting to you is that Lindsey McInnes has no memory of this accident except as perhaps in all of the times--we know his lawyer was talking to him within a week or two, within a week or two after his accident, he came down here." (2604).

There were also crass exaggerations unsupported or contradicted by the record of the amount of alcohol consumed by the plaintiff: "Plaintiff began to drink his lunch at 1:00..." "He drank all

afternoon..." (IV, 28) "Plaintiff spent the day in a beer joint, and could have run into a bunch of kids." (2513). "...the people in the tavern and motorcycle shop begged him not to get on the motorcycle." (2619). Defendant's counsel claimed plaintiff would not be fed alcohol in a nursing home (1606) and that Dr. Rupp helps the State of Texas protect us from drunks (2615).

Defendant's counsel crowned his diatrible against plaintiff's attorneys with shameful references to them as wops and the Mafia. Defendant, having accused plaintiff's counsel of contriving plaintiff's case in sinister fashion like the Mafia, contrived as the Mafia the threats Amos Gardlin testified to.

> "So they have a frame that is too woppy. Can that get loose and woppy? The tolerance in the

> stem...that might make it wobble or woppy[1]..." (1495, 1499).
>
> "Gardlin? Told you they had threatened his life if he talked about recall. Remember that? What was the word? That he might get lost. He might get destroyed. I believe that the Mafia said that he might get blown away.
>
> Now, that might sell in Philadelphia. Do you think that's a good trick? Do you think that's a good Philadelphia trick, that people from Philadelphia might think that Japanese want to save face?" (2583)

The appalling references by word and gesture to plaintiff's attorneys as the Mafia and wops was compounded by the appellate courts in Texas.

The Court of Appeals was clearly not genuine. It noted the remarks:

---

1. The word of art to describe one of the effects of a defective frame is "wobble" and not "woppy". The use of the phrase stopped when plaintiff's counsel, to prevent further damage, outside of the earshot of the court, told defendant's counsel of his improper conduct.

> "So they have a frame that is too woppy. Can that get loose and woppy? The tolerance in the stem...that might make it wobble or woppy...(1495, 1499).

It stated:

> "We cannot accept appellant's contention that these statements were meant to implicitly impugn the Italian ancestry of his lawyers."

That the Court of Appeals was insincere is demonstrated by its immediately striking out the reference to the Mafia in the next objectionable remark it considered. The Court quotes:

> "Now that might sell in Philadelphia. Do you think that's a good trick? Do you think that's a good Philadelphia trick?"

It fails to include the immediately preceding sentence:

> "I believe that the Mafia said that he (Amos Gardlin) might get blown away." (2583).

In short, the Court of Appeals purposely ignored the reference to the Mafia which it could not rationalize.

It then itself delivered a regional slur:

> "We note in regard to this complaint, of appealing to regional bias and prejudice, that appellant's attorney stated at one point that: 'We lawyers, even from Philadelphia, call these products liability cases."

Although requested to consider this issue in the Petition, the Texas Supreme Court refused. It limited the appeal to other issues.

On oral argument, the Supreme Court of Texas (showing its awareness of the misconduct) asked defendant's counsel how he had pronounced "woppy" at trial, yet took no action.

B. LEGAL ANALYSIS

The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230 (1934).

No provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as the Privileges and Immunities Clause. Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978).

Among those fundamental privileges is the right of a citizen of one state to pass through, or to reside in any other state and to institute and maintain actions of any kind in the courts of that state. Corfield v. Coryell, 6 F. Cas. 546, No. 3230 (E.D. Pa. 1823).

In Chambers v. B & O R.R. Co., 207 U.S. 142 (1907), we read:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens.

> Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution."

Likewise, it has been held that the spirit and purpose of the Fourteenth Amendment requires that trials in state courts be free of cognate racially prejudicial slurs in argument. The injection of such slurs even without objection denies the Constitutional right under the due process clause to a fair trial. Such slurs negate the right to a trial on the evidence and not on extraneous issue. A fair trial is a fundamental prerequisite of due process of law. Our system of law has always endeavored to prevent even the probability of unfairness. The probability of prejudice must be adjudged from the cold restatement of the remarks in the record, without inflection or intonation. United States v. McKendrick, 350 F.Supp. 990

(S.D.N.Y. 1972), 481 F.2d 152 (2d Cir. 1973); Miller v. State of North Carolina; 583 F.2d 701 (4th Cir. 1978).

Objection is unnecessary especially where the forum State has adopted the doctrine of incurable error. Miller v. State of North Carolina, 583 F.2d 70 (4th Cir. 1978).

Under Texas law, it is not necessary to object to "incurable" error. Otis Elevator Co. v. Wood, 436 S.W.2d 324 (Tex. 1968); Woddell v. Charter Oak Fire Ins. Co., 473 S.W.2d 660 (Tex. Civ. App. 1971). Regarded as incurable are appeals to prejudice and unseemly epithets such as "liar", "fraud", "faker", "cheat" or the unsupported charge of perjury. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835 (Texas 1979). Also considered as per se incurable are appeals to sectional prejudice, disparaging references to a party's lawyers and accusations that

principal witnesses have been coached. Woddell v. Charter Oak Fire Ins. Co., supra. These or cognate epithets or invectives were adopted by defendant's counsel throughout trial.

Religious, ethnic or nationality slurs such as "Jew" radically pervert the trial. It is

> "the basic principle of our jurisprudence that every citizen, regardless of position, property, race, or belief, is entitled to the same privileges before the law, and to the same impartial trial in court, as every other citizen who comes before it...the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception or assignment."

Skuy v. United States, 261 F. 316 (8th Cir. 1919).

It is understandable that a defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970).

The geographical and ethnic slurs and impugning of plaintiff counsel's integrity in effect deprived the instant plaintiff of his right to counsel.

> "Although there do not appear to be any civil cases on this point, the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process. Powell v. U.S., 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1982); Cooke v. U.S., 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).
>
> Notwithstanding the civil-criminal dichotomy, an analogy can be drawn between the criminal and civil litigant's respective rights to counsel. In both cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step...In each instance, the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement."

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980).

It is obvious that no plaintiff ever relied on an attorney more than the instant plaintiff who was a quadriplegic. In fact, defendant's product cover-up anticipated that there would be profoundly debilitated or dead victims of its decision to cover up. By stonewalling discovery since 1978, it also hoped that the petitioner confined to a nursing home would be discouraged from pursuing his action. Yet at trial, it sought to defend by questioning the ability of the injured man to remember and his proneness to suggestion.

> "The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process.
>
> This right inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights...
>
> The right of access to retained counsel is one of constitutional dimensions and should be freely exercised without impingement."

Mosely v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir. 1981); McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983).

> "...right to effective assistance of counsel. Meaningful access to the courts is a fundamental right of citizenship in this county. Indeed, all other legal rights would be illusory without it."

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982).

The Fourteenth Amendment's guarantees apply to both civil and criminal cases. "It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance." Lee v. Habib, 424 F.2d 896 (D.C. Cir. 1970).

The application by the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the

constitutional strictures which constrain the government. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Hosey v. Club Van Cortlandt, 299 F.Supp. 501 (S.D.N.Y. 1969).

The relentless pattern of vituperatives in which defendant's counsel engaged would not be tolerated in a rudimentary court on the fringes of civilization.

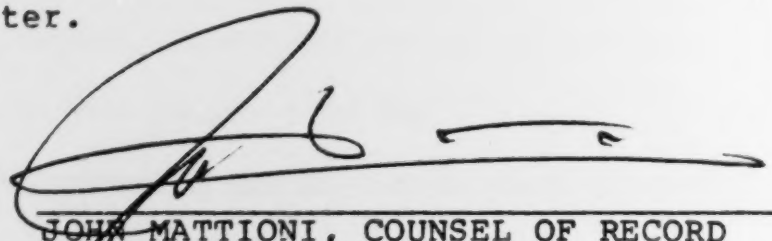
Due process forbids that in any court a party or his lawyer be the recipient of racial or national or regional slurs. And, it is hard to see what can be the worth or legal significance of any objection made or not made. If one is called a nigger, a Kike, a Chink, a Jap, a Wop, a Yankee or whatever, the trial must be deemed tainted and must be presumed unfair especially where other errors have been acknowledged and perversions occurred and the trial, as the instant one, was

close. The same disposition should be as regards the "Mafia", "woppy" and regional slurs that transpired in the instant proceeding.

We all know that the federal courts are courts of limited jurisdiction. Yet, somehow, the Supreme Court of the United States with its supervisory powers to insure that due process will govern in all courts within the United States, should intervene to overrule the travesty of justice that has occurred in the Texas courts. Although the right to discovery may be arguably only statutory, certainly due process exacts that the finality of a judgment cannot stand where it is discovered at a reasonable time after trial and within the appeal period that the defense at trial was based on the concealment of evidence and where ethnic, regional and ethical slurs have been unmeritedly visited upon a plaintiff's

attorney, denying the plaintiff the effective assistance of counsel and a fair trial.

For these reasons, the Petition for the Writ of Certiorari should be granted and a new untainted trial ordered of the matter.

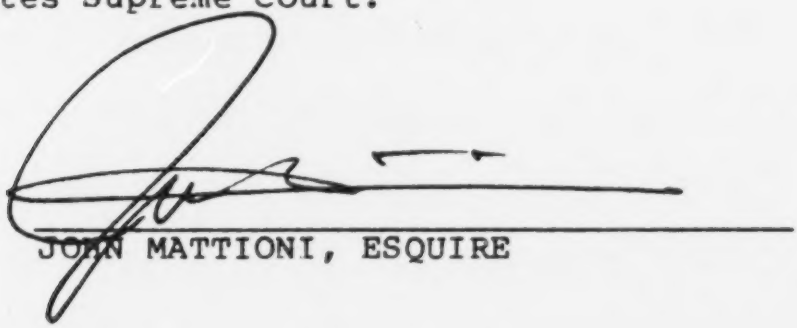


JOHN MATTIONI, COUNSEL OF RECORD
DANTE MATTIONI
FRANCIS X. KELLY
Mattioni, Mattioni & Mattioni, Ltd.
Suite 200, 330 Market Street East
Philadelphia, PA 19106
(215) 629-1600

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 1984, three copies of the Petition for the Writ of Certiorari of Lindsey McInnes have been served on Kathryn Snapka, law offices of Guy Allison, Esquire, 920 Leopard, Corpus Christi, Texas 78401, counsel for the respondent Yamaha Motor Corporation USA by depositing a copy of the same in the United States Mail, first-class postage prepaid.

I also certify that I am a member in good standing of the bar of the United States Supreme Court.



JOHN MATTIONI, ESQUIRE

OPINION OF THE COURT OF APPEALS

OF THE

THIRTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS

CORPUS CHRISTI

(NO. 13-82-138-CV)

OPINION

KENNEDY, Justice

Plaintiff-Appellant was injured to the extent of becoming a quadraplegic patient in a one-vehicle accident while driving a 1973 Yamaha TX 650 motorcycle. He brought suit against several defendants, the only one remaining being appellee, Yamaha Motor Corporation, U.S.A. Appellant pled negligence, strict liability, breach of warranty and Deceptive Trade Practices.

A jury below found defective design of the frame and failure of appellee to give adequate warnings or instructions, but also found that neither of such was a producing cause of the accident. The jury also found that appellant's motorcycle did not develop a "wobble" prior to the accident and that appellant failed to keep a proper lookout which was a proximate cause of the accident.

Appellant's first four points of error are evidence points, i.e., that the jury should have found that the defective frame of the motorcycle was a producing cause of the accident and that the jury should not have found that the motorcycle did not develop an uncontrolled wobble prior to the accident. Thus we are required to pass upon the sufficiency of the evidence in each of these matters.

When a factual insufficiency question is presented the appellate court is required to consider all of the evidence in deciding the question. Garza v. Alviar, 395 S. W. 2d 821 (Tex. 1965); In Re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951). The case of Salazar v. Hill, 551 S. W. 2d 518 (Tex. Civ. App. - Corpus Christi 1977, writ ref'd n.r.e.) decided by this Court, was one involving a rear-end collision where the facts were virtually undisputed. The jury

resolved all issues in favor or the appellee who had run into the rear of the other automobile. There this Court said:

> "As we have noted, the jury is the trier of the facts and as such is in a better position to judge these issues than are we. The jury in this instance answered the negligence issues for the appellees. From the facts in this case we conclude that the jury findings, attacked by appellants merely indicate that the appellants have failed to carry their burden of proving the alleged acts of negligence. Stafford v. Hardi, 464 S.W.2d 958 (Tex. Civ. App. - Dallas 1971, writ ref'd n.r.e.). And the jury's failure to find those facts (of negligence) vital to the appellant's recovery need not be supported by affirmative evidence. Traylor v. Goulding, 497 S. W. 2d 944 (Tex. Sup. 1973). We hold therefore that the findings complained of are not so against the great weight and preponderance of the evidence as to be manifestly wrong."

In other words, it is not necessary for one side to negate by affirmative evidence the evidence presented be the other side. The jury is free to simply disbelieve such evidence.

We have examined the evidence inthe case before us and conclude that it was not error for the jury to make the findings complained of. The first four points of error are overruled.

In points of error numbers five and six appellant complains of the introduction of evidence tending to show that appellant was intoxicated on the occasion in question. It is argued that such is not admissible absent evidence of negligent conduct. Error is also claimed in allowing the County Medical Examiner to speculate on the degree of appellant's intoxication based upon a reading of the treating physician's notes.

Evidence of two separate blood alcohol tests were introduced into evidence. One test, performed at 6:35 p.m. following the accident, which occurred between 4:45 and 5:00 p.m., showed an alcohol content of .131. An

earlier test (5:30 p.m.) showed an alcohol content of .09. In addition, the notes of the treating physician, Dr. Martin, contained in his deposition, stated that appellant was "slightly intoxicated" when he was examined at approximately 8:00 p.m. The Nueces County Medical Examiner, Dr. Rupp, was called by appellee to explain and interpret this evidence. Appellant admitted that he had drunk about six beers before the accident.

Appellant's own evidence was to the effect that this was a onevehicle accident in which appellant, for some reason, lost control of his motorcycle and went through a guardrail. Appellant contends, of course, that this was caused by a defective motorcycle. However, appellee has its own theory, i.e., the intoxication of appellant at the time in question. We reject the argument that there was no evidence of negligent conduct on plaintiff's part.

Appellant cites Dorman v. Langlinais, 592 S.W.2d 650 (Tex. Civ. App. - Beaumont 1979, no writ) as authority for the proposition that evidence of intoxication is inadmissible absent a showing that the driver's performance was erratic. In Dorman, however, the appeals court held that "(c)lose examination established that defendant handled himself 'normally' and there is no evidence of any negligent or unusual conduct caused by alcohol." Dorman involved a two car intersection collision and the question as to which driver was at fault. Our case, as noted earlier, involves a motorcycle which, for no apparent reason, left the pavement and crashed into a guardrail. This, in itself, is evidence of negligent or unusual conduct. Point of error number five is overruled.

As to the alleged error in allowing the medical examiner to speculate about

intoxication from reading the treating physician's notes, such is not precisely what happened. The Medical Examiner testified that for the treating physician to make an observation that a quadraplegic was slightly intoxicated, the patient would be in the range of about 0.1% blood alcohol. This, he explained, is due to the fact that there are fewer symptoms of intoxication in a quadraplegic available to the observer since the observation of the patient would be virtually limited to speech and eye movements. The Medical Examiner then took the 0.1% figure and extrapolated it to indicate the level at the time of the accident.

We agree with appellant that Dr. Rupp should not have been permitted to state an opinion concerning the level of alcohol in the appellant's blood at the time of the accident based upon Dr. Martin's notation that appellant was "slightly

intoxicated." Dr. Martin had no recollection of appellant at the time his testimony was taken. He did not state the basis for his opinion, i.e., the factors he observed which led him to his conclusion. Nor did he explain what he meant by the descriptive "slightly intoxicated." Indeed, when asked what that phrase meant, Dr. Martin responded: "It means he was slightly intoxicated."

An analogous situation is found in Associated Indemnity Corp. v. Dixon, 632 S.W. 2d 833 (Tex. App.-Dallas 1982, writ ref'd n.r.e.), a workers' compensation case where one physician's testimony was based upon another physician's letters concerning the injured employee's condition. The Court held that:

> "(T)hese letters were not a diagnosis of another physician upon which Dr. Daughety (the testifying physician) could base his medical opinion. They tendered no medical findings be Dr. Faust to better enable Dr.

> Daughety to diagnose Dixon's injury, but offered only Dr. Faust's ultimate conclusion that, within the meaning of the Texas Workers Compensation Act, Dixon was probably totally incapacitated. We hold, therefore, that the information in this letter was not information upon which a physician can rely in reaching a medical opinion. Thus, it was inadmissible for any purpose..."

632 S. W. 2d at 835-6.

Given the inherent uncertainty of the term "intoxicated," especially when modified by "slightly," we believe that Dr. Rupp's opinions based thereon provide an even more extreme example than that discussed in the Dixon case.

Dr. Rupp was, however, also able to state, based upon the blood-alcohol tests performed at 6:35 p.m. and 5:30 p.m., that at the time of the accident, appellant's alcohol content would have been .05. These two test results were properly in evidence, and an opinion based thereon was admissible and of probative force. Dr.

Rupp went on to say that the driving abilities of a motorcyclist with .05 alcohol content would be impaired. Given this opinion, we do not feel that the admission of the opinion predicated upon Dr. Martin's observation constitutes reversible error. The point is overruled.

In point of error number seven, complaint is made concerning the trial court's ruling that evidence of complaints made to Yamaha of front-end wobbles that resulted in injuries when the occurrences happened at speeds in excess of 40 m.p.h. would be admitted for the limited purpose of showing notice to Yamaha of the propensity of the TX 650 to so act. Counsel for Yamaha reviewed with the witness Martinez sixty-one warranty complaints concerning wobbling. In so doing, the witness stated, when it was known, the speed at which the wobble occurred. Many of these concerned

incidents in excess of 40 m.p.h. Subsequently, counsel for appellant sought to elicit testimony from the witness Gardlin concerning reports to Yamaha of injuries. The objection was made that incidents occurring at speeds in excess of 40 m.p.h. were not sufficiently similar to appellant's accident to be admissible. The following then transpired:

> "The Court:... What is the materiality of any evidence on speeds or injuries that may have occurred over the range in which the plaintiff testified his motorcycle was going? Mr. Dante Mattioni (counsel for appellant): Notice as it relates to the frame, Your Honor.
>
> . . . . . .
>
> The Court: I will sustain the objection and limit the inquiry into those accidents which may have occurred and as to matters which indicate some type of deficiency in the frame, causing wobble, weaving or otherwise, and for those speeds under 40 miles an hour. Mr. Allison (counsel for appellee): May the jury be instructed that they are not to consider any of those

> that the evidence already shows for proof of anything already in evidence that occurred above 40 miles an hour with something wrong with the motorcycle, which I think is all of them.
>
> The Court: I will allow those in to show some type of notice of a wobble, and I will overrule that objection as to those which are already admitted, but as to the injuries, I will sustain the objection."

It is appellant's contention here that the trial court should have admitted evidence of other wobble complaints regardless of speed, and that no instruction limiting the consideration of those in excess of 40 m.p.h. to the issue of notice should have been given.

We agree with appellant's position. In products liability cases, evidence of other accidents involving the same product is admissible to show its dangerous or hazardous nature if the accident occurred under the same or substantially similar conditions as that involving the

plaintiff. Magic Chef, Inc. v. Sibley, 546 S. W. 2d 851, 855 (Tex. Civ. App.San Antonio 1977, writ ref'd n.r.e.). See Davis, Evidence of Post Accident Failures, Modifications and Design Changes in Products Liability Litigation, 6 St. Mary's L.J. 792, 796 (1975). In discussing the holding in Magic Chef, the 5th Circuit Court of Appeals noted that: "The requisite degree of similarity is plainly not very high..." Mitchell v. Fruehauf Corp., 568 F.2d 1139, 1147 (5th Cir. 1978). In addition to showing a dangerous or defective condition, evidence of similar accidents should also be admitted to show that the alleged injury was caused by that condition. Ginnis vs. Mapes Hotel Corp. 86 Nev. 408, 470, P.2d 135, 139 (1970). See also Zenkel v. Oneida County Creameries Co., 104 Misc. 251, 171, N.Y.S. 676, 677 (1918), aff'd, 188 A.D. 905, 176 N.Y.S. 927 (1919).

However, we do not feel that appellant is now in a position to complain. Counsel's statement, in response to the trial court's query, that the evidence was admissible to show notice served as a limitation upon his offer. In specifying the purpose of profered evidence, the burden is on the offerer to make the proper specific offer. See Luvual v. Henke & Pillot, Division of Kroger Co., 366 S. W. 2d 831, 839 (Tex. Civ. App.-Houston 1963, writ ref'd n.r.e.). Appellant is now bound by his offer. Even had the trial court allowed the admission of further evidence, it would have been subject to the same limiting instruction. The point is overruled.

In his eighth point of error, appellant complains of the action of the trial court in excluding from evidence that portion of the deposition of Leo Lake

taken May 29, 1981. The deposition in question was filed with the Nueces County District Clerk on June 8, 1981, the date the trial commenced.

A review of the deposition in question shows that it was taken in the office of appellant's attorney in Philadelphia, Pennsylvania Present during the deposition was counsel for appellant, counsel for defendant/appellee Yamaha Motor Corp. U.S.A. and counsel for defendants Heldenfels Brothers and Ferro Corporation. Near the end of the last day of the deposition, a dialogue arose between appellant's counsel and counsel for appellee Yamaha over appellee's counsel's right to cross-examine the witness. A synopsis of the conversation indicates that appellee's counsel terminated that day's examination at 5:00 p.m. after appellant's counsel requested he be allowed to finish his examination

after 5:00 p.m. Appellee's counsel then asked to be allowed to cross-examine the witness on the following day (Saturday). Appellant's counsel refused to continue the deposition until the following Monday, citing prior commitments and previous custom of the parties. At the time, counsel for appellee Yamaha voiced an objection to the proceedings as a denial of his right to cross-examine the witness. The deposition does not contain any cross-examination of the witness by appellee Yamaha's counsel.

On June 9th, during the first day of testimony in the trial, appellant's attorney offered testimony from the June 27, 28, and 29 deposition of Leo Lake into evidence. Counsel for appellee Yamaha objected to the evidence and requested a hearing on the question of the admissibility of the deposition. Out of the presence of the jury, the trial court

conducted a hearing on the question of whether or not the deposition in question was admissible. The only argument presented by appellee Yamaha's attorney was that he was denied the right to cross-examine Mr. Lake during the taking of the deposition and, therefore, it was inadmissible. The trial court granted appellee's motion and refused to admit testimony from the last day of deposition into evidence.

Rule 211, Tex. R.Civ.P., states "(r)egardless of whether cross-questions have been propounded, either party has the right to use the deposition on the trial." We feel that this rule controls in this situation. Obviously, the appellee had the right and opportunity to cross-examine Mr. Lake at a subsequent deposition or as a witness during the trial. Regardless of this opportunity to crossexamine Mr. Lake, the rule makes the

deposition admissible subject to the appropriate rules of evidence.

The only case cited by appellee in its arguments and authorities under this point of error is Heldt Brothers Trucks vs. Silva, 464 S.W. 2d 931 (Tex.Civ.App.-Corpus Christi 1971, no writ) In that case and in numerous other cases not cited by appellee's counsel, this Court has held that one who is not a party to a lawsuit will not be bound by the contents of a deposition taken prior to the time they became a party for the reason that they were denied the right of cross-examination. These holdings have no application to this fact situation. In this case, it is clear that appellee Yamaha was a party and was present at all times during which Mr. Lake's deposition was taken and, in fact, that Mr. Lake was a paid employee of appellee Yamaha and, as such, was subject to its control. That

portion of the deposition excluded was admissible.

Again, however, we are not of the opinion that its exclusion constitutes reversible error. We have reviewed the deposition thoroughly. It consists, in large part, of bickering between two of the attorneys concerning discovery and production of evidence. In it are contained only two extremely brief statements concerning what can cause a motorcycle to wobble. As indicated earlier, it was favorable findings concerning causation that appellant failed to procure. We are not able to accept the proposition that the receipt of the excluded portion of Mr. Lake's deposition would have altered that result. The trial court's ruling did not cause the rendition of an improper verdict. Tex.R. Civ.P. 434. Point of error number eight is overruled.

In his next point of error, appellant contends that the trial court erred in excluding the testimony of his daughter concerning a conversation she had with him in the hospital a couple of days after the accident in which he told her that "the bike forced him off the road." In this regard, it is appellant's position that such was admissible to refute appellee's "direct, brutal accusation" of recent fabrication.

When a witness is charged at the trial with recent fabrication, his former consistent declarations are admissible to corroborate his testimony, provided such declarations were made at a time when he had no motive to misrepresent the fact stated by him. Barmore vs. Safety Casualty Co., 363 S.W.2d 355, 358 (Tex. Civ. App.- Beaumont 1963, writ ref'd n.r.e.). We have examined the entire record, including those portions referred

to by appellant in support of this point, and find that the statements made and questions asked by counsel for appellee do not rise to the proportions of charges of recent fabrication. Point of error number nine is overruled.

Point of error number ten concerns the admission by the trial court of evidence concerning a separate law suit filed by appellant in 1972, before the accident here in question, for back injuries in which he had alleged that he had lost the joy of motorcycle riding. Admissions of a party are averments which are inconsistent with his testimony at trial tending to impeach his credibility. Hartford Accident & Indemnity Co. v. McCardell, 369 S.W.2d 331, 337 (Tex. 1963). "An admission (against interest)...'may be defined as any statement made or act done by one of the parties to any action or on his behalf

which amounts to a prior acknowledgement by such party that one of the facts relevant to the issues is not as he now claims.'" Id.

The evidence here complained of was admitted after appellant had testified that, prior to the accident, he had been riding for therapy purposes for his back (although he had not been advised to do so by a physician), and that such was the "best therapy (he) had." The evidence was admissible for impeachment purposes, and no abuse of discretion is shown. The point is without merit and is overruled.

We are next faced with appellant's contention that during oral argument various references to the feasibility of testing the motorcycle involved in the accident caused reversible error. We first address appellee's references to appellant's failure to call certain expert witnesses and produce test results. It

must be noted initially that witnesees for both sides testified that the most accurate way to determine if appellant's motorcycle had a propensity to wobble was to take it out and testdrive it.

We believe that appellee's argument was perfectly valid.

> "Where a party fails to call witnesses who have knowledge of the facts and whose testimony is available to him, such failure creates a presumption that the testimony, if produced, would have been unfavorable to the party on the issue involved... Moreover, where a party does not attempt to prove a particular fact by a certain person whom he could readily call for that purpose, there is a presumption that it could not be done."

1 Ray, Texas Practice, Law of Evidence, §101, p. 159-61 (West 1980).

Appellant also complains of the statement made by counsel for appellee during closing argument that appellant, who had possession of the motorcycle, would not allow appellee the opportunity

to conduct tests upon it. While appellee had made requests to examine the motorcycle, and had, in fact, had an expert look at it, no motion was made to allow a road test until several days into trial. The trial court took the motion under advisement, but did not rule on it. Prior to final arguments, appellant secured a favorable ruling on his motion in limine prohibiting counsel for appellee from making the exact argument about which complaint is here lodged. When counsel got to that point in his argument, appellant objected that it violated the motion in limine, the objection was sustained, and the jury was instructed to disregard counsel's statement.

We assume that juries pay attention to instructions by the trial court and do not consider statements they have been ordered to disregard. Coa. Operators Casualty Co. v. Holloway, 398 S.W.2d 421,

423 (Tex. Civ. App. - Beaumont 1965, writ ref'd n.r.e.). No error is shown, and point of error number eleven is overruled.

Appellant's twelfth point of error alleges cumulative error in what he terms "the repeated, prejudicial side-bar comments, personal and ethnic slurs, appeals to regional bias and prejudice, injection of 'evidence' not in the record" by counsel for appellee. Appellant refers us to numerous examples of the statements which he finds objectionable. These include the following:

> "(S)o they have a frame that is too woppy...:
>
> "Can that get loose and woppy?"
>
> "The tolerances in the stem... that might make it wobble or woppy..."

We cannot accept appellant's contention that these statements were meant to implicitly impugn the Italian ancestory of his lawyers.

> "Now that might sell in Philadelphia. Do you think that's a good trick? Do you think that's a good Philadelphia, trick ...?"
>
> "I don't care where you're from or where you get vour evidence from, I don't think you can come to Corpus Christi, whether you are a Philadelphia lawyer or who you are..."

We note in regard to this complaint, of appealing to regional bias and prejudice, that appellant's attorney stated at one point that: "We lawyers, even from Philadelphia, call these products liability cases."

A very few of the other examples of which appellant now complains:

> "I'm sorry. Mumble a little louder, okay?" (Made in reference to appellant's counsel's examination of a witness.)
>
> "(I)n a voice that at least I could hear for the first time in three weeks..." (Referring to counsel's closing argument.)
>
> "Your Honor, I can't hear him when he mumbles." (Made while examining a witness.)

"I think that everybody that testified lied for them..." (Made in closing argument.)

"You heard that goose from California, Nelson..." (Made in closing argument in reference to one of appellant's witnesses.)

"That's just somebody that happens to know and happens to do this sort of thing for a living, helping the State of Texas protect us from drunks." (Referring to Dr. Rupp's testimony.)

"But I've had a lot of cases on the other side where I've represented somebody that was hurt, and I don't know that you'd find another defense lawyer that was as upfront with you." (Appellee's counsel referring to himself in final argument.)

When alleging improper arguments by counsel, the complainant has the burden to prove (1) an error (2) that was not invited or provoked (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt

withdrawal of the statement, or a reprimand from the judge. Standard Fire Insurance Co. v. Reese, 584 S.W. 2d 835, 839 (Tex. 1979). In order for improper argument to be deemed incurable, it must further be shown that, by its nature, degree and extent, it constituted reversibly harmful error. Id. "All of the evidence must be closely examined to determine... the argument's probable effect on a material finding." Id at 840. Compare Texas Employers Insurance Ass'n v. Haywood, 153 Tex. 242, 266 S.W. 2d 856 (1954) (where unobjected to arguments concerning the credibility of witnesses because they were "a couple of those yellow nigs" was held to constitute uncurable, reversible error) with Ramirez v. Acker, 124 S.W.2d 905 (Tex. Civ. App. - Beaumont 1939), aff'd 134 Tex. 647, 138 S.W.2d 1054 (1940) (where defense counsel argued that plaintiff's case "stinks,"

that plaintiff was a victim of a scheme or design by somebody to use him to their advantage, and that somebody ought to be indicted for filing and prosecuting the suit, and such was held not to constitute reversible error).

We have reviewed the entire record in this case, which constitutes 2,650 pages of statement of fact. We find but a handful of times where objections were raised by appellant at the proper junctures. Given the nature of the arguments complained of (i.e. curable be objection and instruction), we believe that error has, by and large, been waived. Standard Fire Insurance Co. v. Reese, 584, S.W.2d at 840-1. Moreover, having examined the entire record, the state of the evidence, the strength and weakness of the case, and the fact that the jury made several findings favorable to appellant, we are of the opinion that

the jury carefully considered its verdict and the evidence and that the same result would have been reached without regard to the arguments which may not have been proper. Id. at 841. The point is overruled.

In point of error number thirteen, the complaint is made that the trial court erred in denying appellant's motion to strike Yamaha's pleadings because of its repeated abuses of discovery procedures or, alternatively, in failing to grant his motion for new trial or judgment n.o.v. for the same reason.

Preparation of this case was long and entailed exhaustive discovery. Numerous motions for sanctions for failure to make discovery were filed against Yamaha by appellant and other defendants, starting two years before the case came to trial. However, the imposition of penalties or sanctions for such is a matter within the

sound discretion of the trial court which will not be set aside absent a showing of abuse. Bass v. Duffey, 620 S.W.2d 847 at 849; Lueg v. Tewell, 572 S.W.2d 97 at 104.

A hearing must be held before Rule 170 sanctions may be imposed. Smith v. Wilkins, 577 S.W.2d 522, 524 (Tex. Civ.App. Texarkana 1979, no writ); Lueg v. Tewell, 572 S.W. 2d at 104. Appellant's motion came on to be heard in the trial court on June 8, 1981, one day before the actual trial commenced. At that time, the court indicated that appellant's motion would be carried "day to day' during the trial. No objection was made to this ruling by appellant, and no motion for continuance was urged. Approximately seven months after the trial, a hearing was held at which Yamaha was ordered to pay appellant's counsel $26,748.65 as sanctions for its failure to comply with discovery orders.

If appellant felt that he was ill-prepared to go forth with his case due to Yamaha's failure to comply with discovery orders, he should have urged a motion for continuance and a full-blown pre-trial hearing on his motion to strike Yamaha's pleadings. Announcing ready for trial and then re-urging his motions for judgment n.o.v. and for new trial was not the proper procedural tack in this instance. No abuse of discretion is shown, and the point is overruled.

(27,28) Appellant's final point of error alleges that the trial court should have granted his motion for new trial based upon "newly discovered" evidence. Specifically, appellant refers to evidence of test results conducted by Yamaha which tended to show the effect of striations on the road surface upon the propensity of the TX 650 to wobble. The evidence was sealed by Yamaha during a pre-trial

deposition, at which appellant's counsel was present and was not opened and examined by the court until a post-trial hearing.

The following are indispensable elements to the granting of a new trial upon newly discovered evidence in a civil case: (1) admissible, competent evidence must be introduced on the hearing of the motion for new trial showing the existence of the newly discovered evidence relied upon; (2) the parties seeking a new trial must show that there was no notice of the existence of such evidence prior to the time of trial; (3) that due diligence had been used to procure the evidence prior to trial; (4) that the evidence is not merely cumulative to that already given and does not tend only to impeach the testimony of the adversary; and (5) the evidence would probably produce a different result if a new trial were granted. Wilkins v. Royal

Indemnity Co., 592 S.W.2d 64, 68-9 (Tex. Civ.App.-Tyler 1979, no writ); In re Y, 516 S.W.2d 199, 2056 (Tex.Civ. App.-Corpus Christi 1974, writ ref'd n.r.e.). It is apparent that elements (2) and (3) have not been complied with in this case. Not only was appellant aware of the existence of the evidence prior to trial, but should have, in the exercise of due dilignece, urged the court to examine it and rule on his motion for production at a pre-trial hearing. The point of error is overruled, and the judgment of the trial court is affirmed.

OPINION OF THE TEXAS SUPREME COURT

(C-2579)

RAY, Justice.

Lindsey McInnes brought this suit against Yamaha Motor Corporation, U.S.A., and other defendants, to recover for injuries he received in a motorcycle accident which occurred on November 2, 1974, in Corpus Christi, Texas. McInnes claimed that as he was operating his 1973 Yamaha TX 650 motorcycle, the motorcycle went out of control and crashed into a highway guardrail, causing him to be rendered a quadriplegic.[1] All defendants except Yamaha were either dismissed or granted judgment prior to trial. Against Yamaha, McInnes pleaded causes of action in negligence, strict liability, breach of warranty, and deceptive trade practices.

---

1. A suggestion of death filed with this court indicates that McInnes died in December of 1983. However, we adjudicate this cause as if all parties were still living. See Tex. R. Civ. P. 369a.

Trial was to a jury. The jury found that the frame of the motorcycle involved in the accident was defectively designed, that Yamaha failed to give McInnes adequate warnings regarding use of the motorcycle, and that McInnes' actual damages totalled approximately $3.9 million. The jury also found that neither defective design nor failure to warn was a producing cause of the accident. The jury further found that the motorcycle did 6Ct develop an uncontrollable wobble prior to the accident and that McInnes' failure to keep a proper lookout was a proximate cause of the accident. The trial court rendered judgment upon the verdict that McInnes take nothing. The court of appeals affirmed. 656 S.W.2d.704 (Tex.App.1983). Before this court, McInnes brings four points of error concerning evidentiary matters. We affirm the judgments of the courts below.

We first address McInnes' argument that the trial court improperly excluded from evidence that portion of the deposition of Leo Lake taken on May 29, 1981. The deposition was filed with the trial court on June 8, 1981, the date trial began. McInnes contends that in the excluded portion of the deposition, Lake, a Yamaha official, acknowledged that the 1973 Yamaha TX 650 could wobble at speeds less than forty miles per hour. There was testimony at trial that McInnes was travelling at a speed of forty miles per hour or less when the accident occurred. McInnes asserts that because the excluded testimony of Lake was the only direct admission by Yamaha that its 1973 TX 650 motorcycle was subject to "low speed wobble," exclusion of the testimony was reversible error. The argument is that the jury probably would have found that the defectively designed frame of the

motocycle caused McInnes' accident if it had heard testimony by an official of Yamaha that the motorcycle could wobble at relatively low speeds.

We do not reach the question of whether the trial court erred in excluding the May 29, 1981, portion of Lake's deposition, because McInnes has failed to preserve the point. The statement of facts reveals that the trial court held a hearing on the admissibility of the deposition in question outside the presence of the jury. Yamaha claimed that the deposition was inadmissible because it had been deprived of an opportunity to cross-examine Lake during the taking of the deposition. Counsel on the two sides then argued at length about who was at fault for Yamaha's failure to cross-examine Lake. After the trial court ruled that the disputed portion of Lake's deposition was inadmissible, the jury

returned to the courtroom and trial continued. Counsel for McInnes did not even attempt to perfect a proper bill of exceptions containing the proffered evidence, as required by Texas Rule of Civil Procedure 372. The excluded testimony is not set forth in a formal bill of exceptions, nor does it otherwise appear in the statement of facts. Therefore, McInnes' assignment of error regarding the exclusion of Lake's deposition testimony has not been properly preserved. See Duncan v. Cessna Aircraft Co., 665 S.W.2d.414 (Tex. 1984).

McInnes argues that since Lake's deposition was already on file with the trial court when it was excluded from evidence, the depositon itself constitutes a sufficient bill of exceptions. We disagree. The requirements for a bill of exceptions found in Rule 372 ensure that the bill is accurate and complete.

Obviously, this important purpose would be defeated if we were to excuse failure to comply with those requirements. That Lake's excluded deposition was on file with the trial court and subsequently accompanied the record on appeal is not sufficient to make it a proper bill of exceptions. See Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc. 602 S.W.2d.282, 297 (Tex.Civ.App.-Dallas 1980, no writ); Victoria Comfort Air Co. v. Alamo Express, Inc. 529 S.W.2d.250, 252 (Tex.Civ.App.-Corpus Christi 1975, no writ); Dallas Fountain & Fixture Co. v. Hill, 330 S.W.2d.648, 650 (Tex. Civ.App.-Dallas 1959, writ ref'd n.r.e.); c.f. Wise v. Pena, 552 S.W.2d.196, 202(Tex.Civ.App.-Corpus Christi 1977, writ dism'd w.o.j.)(summary judgment evidence is not a substitute for bill of exceptions).

The second issue before this court is whether the trial court erred in admitting

evidence concerning McInnes' consumption of alcohol on the day of the accident. McInnes claims that as a predicate for the admission of such evidence, Yamaha was required to produce some independent evidence of improper conduct on the part of McInnes prior to the accident. Yamaha responds that McInnes has waived this point of error, because his own counsel first brought up the subject of McInnes' alcohol consumption. We agree with Yamaha.

A party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he, himself, introduced the same evidence or evidence of a similar character. Pouncy v. Garner, 626 S.W.2d. 337, 340 (Tex.App.-Tyler 1981, writ ref'd n.r.e.); Hughes v. State, 302 S.W.2d.747, 750 (Tex.Civ.App.-Eastland 1957, writ ref'd n.r.e.); see Kutch v. Holly, 77 Tex. 220, 14 S.W.32, 34 (1890). Counsel for

McInnes made the first reference in front of the jury to McInnes' alcohol consumption. During his opening statement McInnes' counsel said:

> On that day (McInnes) took his motorcycle to the Spot Cycle Shop, which is off State Highway 286. It was approximately 1:00 o'clock or shortly thereafter, and he left his motorcycle there. During the interim he played some pool while they worked on his motorcycle and he had a few glasses of beer.

Counsel for McInnes also introduced the first evidence concerning McInnes' alcohol consumption by reading to the jury McInnes' deposition, in which McInnes testified that he drank six glasses of beer prior to the accident. It is clear from the record that McInnes is in no position to complain of the admission of evidence that he consumed alcohol on the day of the accident. Thus, we do not reach the issue of whether Yamaha laid the proper predicate for the admission of such evidence.

We turn next to McInnes' complaint that the trial court erred in admitting "speculative" testimony of Dr. Rupe, a forensic pathologist called to the stand by Yamaha. On direct examination, Dr. Rupp calculated the amount of alcohol in McInnes' bloodstream at the time of the accident. His first calculation was based upon a notation made in McInnes' hospital records by Dr. Martin, the physician who treated McInnes after the accident. These hospital records were properly in evidence under Tex.Rev.Civ.Stat.Ann.art 3737e. Dr. Martin had noted that McInnes was "slightly intoxicated" at 8:00 p.m. on the day of the accident. Dr. Rupp testified that in order for such an observation to have been made on a quadriplegic patient such as McInnes, McInnes' blood-alcohol level must have been .1 percent. Using an absorption rate of alcohol by the body of .02 percent per hour, Dr. Rupp

extrapolated from this .1 percent figure and concluded that McInnes had a blood-alcohol level of .16 percent when the accident occurred at 5:00 p.m. He stated that this meant that McInnes had six or seven beers in his system at the time of the accident.

The parties agree that Dr. Martin's observation that McInnes was "slightly intoxicated" was an insufficient basis for Dr. Rupp's opinion that McInnes' blood-alcohol level was .1 percent at the time the observation was made. Therefore, whether it was error to admit this opinion is a question we need not decide; it is assumed to be so. The issue for decision is whether the trial court's error in admitting Dr. Rupp's opinion, and the testimony based thereon, presents grounds for a new trial. McInnes contends that putting Dr. Rupp's inadmissible testimony into evidence resulted in an improper jury

finding that McInnes' failure to keep a proper lookout was a proximate cause of the accident.

The erroneous admission of testimony that is cumulative is ordinarily not reversibly harmful. Whitener v. Traders & General Ins. Co., 155 Tex.461, 289 S.W.2d.233 (1956). The record establishes that the improperly admitted testimony of Dr. Rupp was cumulative of other evidence before the jury. Dr. Rupp himself gave admissible testimony based upon two blood-alcohol tests prepared from samples of McInnes' blood taken shortly after the accident. One test was taken at 5:30 p.m. and revealed a blood-alcohol level of .09 percent; the other test was conducted at 6:35 p.m. and indicated a blood alcohol level of .31 percent. The tests themselves were properly admitted into evidence and were of probative force. Dr. Rupp's testimony based upon the test

result of a .131 percent blood-alcohol level was very similar to his inadmissible testimony. McInnes correctly points out that when Dr. Rupp was confronted on crossexamination with the 5:30 p.m. test indicating a blood-alcohol level of .09 percent, Dr. Rupp conceded that McInnes' blood-alcohol level might have been as low as .05 percent at the time of the accident. However, we fail to see how this overcomes the fact that Dr. Rupp gave admissible testimony which was substantially the same as his inadmissible testimony. We note also that the police officer who investigated McInnes' accident, Dr. Martin, and McInnes himself gave testimony from which the jury might have concluded that McInnes was under the influence of alcohol at the time of the accident. Clearly, the testimony of Dr. Rupp which was based upon the notation "slightly intoxicated" added little or

nothing to the evidence properly before the jury. We conclude from an examination of the entire record that the error, if any, in the admission of this testimony was not such as was reasonably calculated to cause and probably did cause the rendition of an improper judgment. TEX.R.CIV.P.503.

The fourth issue before us is whether the trial court erred in excluding testimony by Jean McInnes Saldamarco, McInnes' daughter, that McInnes told her soon after the accident that "the bike forced me off the road." Saldamarco testified that she visited McInnes in the hospital the day after the accident. McInnes was conscious but unable to speak. Saldamarco stated that she employed a system of communication whereby she would recite the letters of the alphabet and McInnes would blink his eyes when the letter he wanted to convey was

said. In this manner, McInnes could, letter by letter, form words and sentences. McInnes' complaint is that the trial court excluded the following testimony, which is found in McInnes' bill of exceptions:

> COUNSEL FOR McINNES: What was the question that you asked in regard to how the accident happened?
>
> SALDAMARCO: I asked him how it happened.
>
> COUNSEL FOR McINNES: And what was his answer?
>
> SALDAMARCO: He told us that the bike forced him off the road.

McInnes asserts that this testimony should have been admitted to rebut Yamaha's charges that McInnes fabricated his lawsuit. We agree, but hold that exclusion of the testimony was not reversibly harmful.

The statement by McInnes to which Saldamarco testified was hearsay. This court, however, has previously recognized,

as an exception to the hearsay rule, the admissibility of prior consistent statements to support a witness who has been charged with recent fabrication of his testimony.[2] Skillern & Sons, Inc. v. Rosen, 359 S.W.2d. 298, .301-02 (Tex.1962); Houston & T.C.Ry.Co. v. Fox, 106 Tex.317, 166 S.W. 693, 695-96(1914); Aetna Ins. Co. v. Eastman, 95 Tex. 34, 64 S.W. 863, 863 (1901). See R.Ray, Law of Evidence § 774 (Texas Practice 3d. ed. 1980). One situation in which the theory of recent fabrication applies is when the opposing party seeks to impeach a witness by making imputations that such witness failed to speak at a time when he could have been reasonably expected to have done

---

2. Under the Texas Rules of Evidence, effective as of September 1, 1983, a prior consistent statement offered to rebut a charge of recent fabrication is not included under the definition of hearsay. See Tex. R. Ev. 801(e)(1)(B).

so. Skillern & Sons, Inc. v. Rosen, 359 S.W.2d. at 301. In this situation, prior consistent statements made before the declarant had a motive to rebut the charge of recent fabrication are admissible. Barmore v. Safety Casualty Co.,363 S.W. 2d.355, 359(Tex.Civ.App.-Beaumont 1962, writ ref'd n.r.e.).

The record establishes that at various times during trial, Yamaha insinuated that McInnes had recently fabricated his testimony that the "wobble" or "shimmy" of his motorcycle caused the accident. For example, during voir dire, counsel for Yamaha stated:

> Now, coming at it another way, Lindsey McInnes has a wreck and gets knocked out and there may not be any other competent evidence as to what happened, and maybe a year or two or three later, Lindsey McInnes remembers that he thinks that the motorcycle shimmied, and you may want to weigh that to see how viable and credible it is.

During his opening statement, Yamaha's counsel made this assertion:

> He (McInnes) continuously told his doctors that he had no memory of the accident, and two years to the day after the accident, sues the Yamaha Motor Corporation saying that it had manufactured a defective product, and even though his doctor says it is virtually impossible that anyone would remember .....

The following exchange occurred during cross-examination of McInnes by Yamaha:

Q. Who was the first person you told that your bike had shimmied?

A. Who was the first person I told that my bike had shimmied? Who was the first person I seen that my bike was shimmying, you said?

Q. Yes, sir.

A. I don't know what you mean.

Q. Was Mr. Mattioni (counsel for McInnes) the first person you told that your bike had shimmied?

A. No,sir.

Q. Getting back to my question, Mr. McInnes. Did you tell Dr. Frank Martin that you had amnesia for the accident and could not remember anything about the accident?

A. No, sir.

Q. You could always remember the accident?

A. I remember everything before and everything after - not everything after - not after the accident.

Clearly, Yamaha charged McInnes with recent fabrication, and the the trial court erred in excluding the testimony of Saldamarco which was offered to rebut that charge. However, we hold that the error the trial court committed in excluding Saldamarco's statement was not such as to require a new trial. The exclusion of cumulative evidence is not reversible error. Reina v. General Accident Fire & Life Assurance Corp. Ltd., 611 S.W.2d 415 (Tex. 1981). McInnes' account of what caused his accident was corroborated by

the testimony of two other witnesses - Hubert Smith, the only eyewitness to the accident, and Randy Nelson, an expert in motorcycle design and accident reconstruction. We also point out that the excluded statement of McInnes that "the motorcycle forced me off the road" does not necessarily confirm McInnes' testimony that an uncontrollable wobble in the motorcycle caused his accident. The statement is obviously subject to some interpretation. To hold that this statement was admissible to rebut a charge of recent fabrication is one thing; to conclude that its admission probably would have led the jury to believe McInnes' account of the accident is quite another. We do not believe that the exclusion of Jean McInnes Saldamarco's testimony amounted to such a denial of the rights of McInnes as was reasonably calculated to cause and probably did cause

the rendition of an improper judgment. TEX.R.CIV.P. 503.

We conclude that the errors of the trial court were not such, separately or cumulatively, as to require a new trial of this case. The judgments of the trial court and court of appeals are affirmed.

BEST AVAILABLE COPY

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

July 18, 1984

JUL 23 198

. Dante Mattioni, Atty.
. Francis X. Kelly, Atty.
ite 200, 330 Market Street East
iladelphia, PA 19106

ivey & Grigg
. Broadus A. Spivey, Atty.
. Paul E. Knisely, Atty/
O. Box 2011
stin, Texas 78768

ite, Huseman, Pletcher & Powers
. Anthony E. Pletcher, Atty.
O. Drawer 2707
rpus Christi, Texas 78473

w Office of Guy Allison
. Kathryn Snapka, Atty.
0 Leopard Street
rpus Christi, Texas 78401

RE: C-2579, LINDSEY McINNES vs. YAMAHA MOTOR CORP., U.S.A.

r Counsel:

Today, the Supreme Court of Texas overruled petitioner's
ion for rehearing in the above referenced cause.

Very truly yours,

GARSON R. JACKSON, CLERK

By Claire Keefe
Claire Keefe, Deputy

RESPONDENT'S OPENING ARGUMENT

THE COURT: Mr. Allison.

MR. ALLISON: Yes, sir.

I hope you guys remember what the Judge told you to begin with; that what the lawyers said wasn't evidence, because I think that by the time we're through

with this lawsuit, that the evidence will show that my client is a distributor of motorcycles in the United States; probably sold about 70,000 of these bikes that constituted approximately the state of the art for building them just bigger and stronger, like there are some stronger cars and there are some that are not as strong -- not that that has anything to do with that.

Now, we'll show you that out of maybe 70,000 motorcycles that have been sold, that there were probably a hundred or a hundred fifty that had some wobble problems. I don't claim to know everything about the Yamaha motorcycle, and if I'm off a few, you can jump on me after the case. But these problems were caused not because the frame was weak, but because of honest-togoodness wearout or

defect or things that all of you know can go wrong.

I don't imagine I have to tell any of you on the jury that your front wheel could wobble on your car. Everybody knows that. If their wheels get out of line, they could wobble, or they might take it in, and there were a variety of things that the Yamaha people will do.

If the bushing was bad -- and nobody has ever tried to tell anybody, say that you can't have a bad bushing. Everybody knows that if it's mechanical, it can be bad. If it is a bad phrenolic (Sic.) -- I think

that's the right word -- bushing -- and I'm trying to answer some of the things he said; ordinarily I'd leave them to the evidence -- but we give them a brass one because we hoped it would be better and we hoped that it would do a better job.

If they had some problems with the frames, out of 75,000 of them, maybe the evidence will show that there were 14, 20 -- something like that -- that there were wobble problems that they couldn't fix with either the fork extension or the brass bushing or the alignment kind of things. But nearly all of the 75,000 -- and I would suppose there isn't anybody, if we just take five seconds out of their life, that if we could convince the jury that they were like that all the time, they'd think they were a bad person. And they're not.

Well, we're talking about a hundred and fifty bikes, two hundred, out of 70,000., that they had something well known to the motorcycle industry; it had wobble. It shimmied when they got a first class bike. We'll get to that.

Now, what do they do to fix it? They changed the bushing. Well, the evidence in this case is going to show that there was nothing defective about the bushing in Lindsey McInnes' bike

They are going to show that sometimes they had

to tighten the bearings, front wheel or back wheel, oralign the back wheel, and the evidence is going to show that there was nothing wrong with the bearings in Lindsey McInnes' bike.

Evidence will show that sometimes, and we're talking at least a hundred fifty people out of 70,000, 70,000 -- sometimes they had to do something else, and they would fix it.

Now, there were 15 or 20 bikes that they recalled -- whatever the right word would be -- and sold the dealers, presumably, parts. There will be some evidence of what they did with, maybe, but he wants you to say that the Yamaha people crippled Lindsey McInnes intentionally, and that giving him a bike that 15 or 20 people had had frame problems with out of 70,000 was a conscious indifference to the

rights of others, and we have for you a letter written by the person in charge of that, pointing out that we've got to be careful that they don't -- that the dealers don't resell these wobblers, because that would be criminal to do that.

Now, I suggest to you -- and by wobblers, I mean the ones that had, out of 70,000 bikes they didn't get the frame together right, didn't get the welds right -- nothing like this is wrong with Lindsey McInnes' bike. Nothing at all. None of these things.

Now, you might wonder as you listen to this testimony why, if they really think that Lindsey McInnes had a bike that would wobble at 30 miles an hour and cause him to lose control -- nothing wrong with the bike. He didn't hit the guard rail. He just went straight instead of making either one of the turns. He came out from under the underpass and went over the hill and went straight. he wasn't familiar with the area. Had two or three seconds to figure out what to do.

What do you say, Lawyer Allison? Why would he do that? Why would he do that? And it will be very clear, I believe, by the time the testimony is over with that unlike all of us who have had a long day, Lindsey McInnes, age 54, retired, woke up around noon, perhaps stirred around the house a little bit, ate

nothing, and decided since it had been a long day, that he would go over and get a tire changed and spend a few hours at the local beer joint.

Lindsey, after arriving at noon, began to drink his lunch around 1:00 o'clock; that he drank all afternoon, and that he drank so much that at 8:00 o'clock that night, when your surgeon, Frank Martin, first saw Lindsey McInnes to treat him in the hospital three hours after the accident, he was still a little drunk.

The blood alcohol that you will hear about from

Dr.Rupp, our Medical Examiner -- and you will hear from Dr. Rupp -- that Lindsey McInnes drank about 12 beers that afternoon, got on his motorcycle which he had driven, according to his testimony, 26,000 miles without a problem, without a wobble, without a complaint, and then went straight at a curb designed to give him two seconds in a drunken condition that enabled him to neither make up his mind to go left or right; he just went straight.

He continuously told his doctors that he had no memory of the accident, and two years to the day after the accident, sues the Yamaha Motor Corporation saying that it had manufactured a defective product, and even though his doctor says it is virtually impossible that anyone would remember -- I believe in the words of the doctor: well, you may remember the

round that you got knocked out in as being the second round, but if you don't remember the punch when you wake up, you'll never remember the punch. His doctor is going to tell you he can't remember these things that he tells you: he remembers he drove along at 30 miles an hour, and suddenly without warning he had this terrible wobble, which for the first time occurred after 12 beers and twenty to twenty-six thousand miles. Now, who is going to believe that?

What happened to Lindsey McInnes was awful.

I don't wish it on anybody, wouldn't want it to happen to anybody, and you may get mad at me because I'm not willing to conduct this trial in some kind of funeral or funeral-like posture out of some kind of reverence, and stay back and not cross-examine Lindsey McInnes about his stop, but this happens because of Lindsey McInnes' stop, drinking his lunch and going too fast.

The lawyer mentioned the eye witness. The eye witness, we think will show, saw nothing. He told the policeman he saw nothing; didn't even remember who was in the car with him. But the two people who were in the car with him are going to come and tell you they weren't even close enough to see the accident; that they were the second car that came, and the guy that's their star witness --

going 30 miles an hour, feeds over into the right lane, puts his right blinker on, signals with his hand and looks back, and suddenly without warning his bike begins to vibrate, and the front wheel turns 90 degrees, according to the star witness, to the axis of the motorcycle, and he slides at 30 miles an hour a hundred feet into the guard rail and hurts himself.

Well, first of all, it's impossible for it to happen that way. Secondly, that guy didn't see anything, has said he didn't, and is now for some reason unknown to me, changing his story. But you'll have to

weigh that. You'll have to wonder what suggestion, since Dr. Martin says that a person with no memory is highly susceptible to suggestion; someone tells you what probably happened and they remember that. They say that's what happened; that doesn't make it true.

Well, we're not here because we want to be, I'll promise you. We're here because we're defending a lawsuit where the Plaintiff is badly hurt, where the things that you worry most about would be sympathy, where they have the burden to prove to you by the pre ponderance of the believable evidence rather that contrived evidence that what they say happened. Listen to their case. Listen to our case. I'll bring you a pretty good man that tests motorcycles, writes a lot about it; you'll probably enjoy him. One thing

he pointed out to me you might give some serious thought to is this witness who says the wheel turned at right angles to the bike after this terrible shimmy tore the handlebars at 30 miles an hour out of McInnes' hands, is that a Yamaha, for safety reasons, has a stop, and you can't turn the wheel more than 30 degrees without braking the stop -- 22 degrees, I think -- not very much off center. But yet their star witness says it turned all the way without braking the stop. Now, you might wonder.

Well, we're here to listen to the case. I hope you are. I hope you'll not be misguided. I hope you are not, you know, just like people who believe everything you hear. Weigh what you hear. Use your common sense, and as you think about it, wonder why in 26,000 miles of safe operation, the only time that McInnes claimed his bike malfunctioned was after 12 beers.

Thank you.

RESPONDENT'S CLOSING ARGUMENT

Mr. Fletcher, Your Honor, ladies and gentlemen: If I understand Mr. Mattioni's statement to you adequately, I have been calling everybody names here because I don't have the law on my side and I don't have the facts on my side, and therefore you-all ought to all be angry with me because I did all of these bad things in an attempt to defeat what he finally has said, in a voince that at least I could hear for the first time in three weeks, said that my client did certain things or contributed to certain things that were harmful to Mr. McInnes.

I accept the responsibility for the things that I have said and the things that I have done. I am naturally not funereal in things that I approach. I'm a happy person, and if I have offended some of you by

virtue of the fact that I have been outspoken and don't mind telling you what I think, and you know, you can accept that or reject that, and if I have called some names -- which I don't think that I have -- then you weigh that against me, and Mr. Mattioni wants you to weigh that against my client.

That's another pitch for sympathy and for prejudice against my client. I have heard about Japanese and Japs. I have heard about selling all of these things and doing this and doing that. All I've heard for two and a half weeks is either a sympathy pitch or a biased pitch, and there is not a single person on this jury that hasn't at one time in their lives had that happen to them and know what it feels like to have somebody compare apples to oranges to

grapefruit to watermelons to tomatoes and he reaches in his little sack of Philadelphia tricks and he pulls out a watermelon trick and he calls it an orange. And he is comparing all those things, and he has compared them, and I wonder if he thinks that you haven't ever caught him.

He says that I think that he has contrived some of this lawsuit, and I'll stand behind that statement that he has made and I will agree that I think he has; somebody has, whether he has, whether the natural motility of a witness, whether it's Sgt. Smith or whoever

it is, to want to help somebody, and maybe make another pitch to make you want to do that instead of answering the case based on the facts and the facts alone and the evidence and the evidence alone, comparing oranges and oranges and apples and apples and grapefruit and grapefruit.

Well, what do you mean by that, Lawyer Allison? Well, he says that I have introduced in this case some name-calling, and I wouldn't mention this; I don't think it's worthy of mention in a lawsuit when the Court tells you that you are obviously supposed to decide a case based on certain things. But they brought it up.

Now, how realistic did it sit with you, all kidding aside, when this guy from California said that he doesn't like -- that he is not at all biased to Yamaha, who dumped him for no reason; didn't tell

him, and just caught a bus up here to testify and couldn't remember what town he was in. Gardlin? Told you they had threatened his life if he talked about recall. Remember that? What was the word? That he might get lost. He might get destroyed. I believe that the Maffia said that he might get blown away.

Now, that might sell in Philadelphia, Do you think that's a good trick? Do you think that's a good Philadelphia trick, that people from Philadelphia might

think that Japanese want to save face?

Or does it fall back to the same thing that we know we have seen, know we have seen with Sgt. Smith? Didn't you just see them developing him in seven years, seven and a half years?

You know, I didn't make any of the facts of this accident. Didn't make any of the witnesses. But they have not called one single witness that was a treating doctor, a personal anything, and they jump on us because we call who? The County Medical Examiner to tell you that whatever blood alcohol level that man had was too much, and he was impaired, and he was not at all surprised that he drove his motorcycle straight at a curve; that happens all the time, happens to motorcycles more that other things because you have got additional things, balance or

whatnot. Are we bad because we did that? How did we concoct the story with the County Medical Examiner, make him lie for us?

Dr. Martin,the treating doctor, even though they have the burden of proof, the treating doctor -you tell me, my friends, how we got Dr. Martin to lie to you on deposition that they took, and tell you that if this man in the hospital had amesia for the accident if he did not remember the facts of the accident, even 100 out of a hundred, he had zero chance of ever

remembering the accident. Now, that is not my witness. I had no choice in that witness. Not somebody I brought. Not somebody I selected.

Have they in any way tried to defeat that except tell you that Lindsey McInnes remembers a few things? What does he remember? Unbelievably, not anything the same, not anything like Sgt. Smith remembers. But then I'm getting ahead of myself, and I probably will finish before an hour and fifteen minutes, which is what the Judge gave me to talk with you about the case. And I'll tell you that a lawyer always makes three arguments: one that he works on the night before and that he hopes will be a good argument, and one he spends all his time figuring on and losing sleep on; then the one he makes while he's standing up here with 12

people' looking at him, and he's a little nervous -- I promise you -- on the case; there is that argument. Then, my friends, there's the argument that the lawyer makes while you-all are in the jury room deliberating the case and he remembers all those things that he knows he meant to mention, that he figured on mentioning the night before, should have thought about, but didn't say. So what I'm trying to tell you is that when the Judge gives the lawyer an hour and fifteen minutes to talk, he may promise you that he's going to give you some time back,

and I'm going to tell you that I am, but don't be upset and think I have misrepresented something if I don't do that.

Now, I believe Mr. Bates from the Highway Department told you that in 1976, was it, when this lawsuit was filed -- whenever it was filed, he went out on orders from the State to try to figure out what it was about. They had no information about it, and Yamaha, like the same goose in the snowstorm, woke up about that time and found out that Lindsey McInnes was claiming that his motorcycle malfunctioned.

What is the first, what is the natural thing to do? And the State does it. We were too slow -- and maybe my client will criticize me for that. We were too slow to do it -- but the State

went out to take the statement from Officer Holmes and from Mr. Smith, who claimed to be a witness to the accident.

Now, two and a half weeks ago, when we were talking about being fair and being impartial and all that kind of thing, I mentioned to you that when a lawsuit is filed, a plaintiff can come into the courtroom and file a lawsuit against anybody it wants to for any reason it wants to, for any sum of money it wants to, make any allegations it wants to and it is up to that person to bring you proof by a preponderance of the evidence that

it happened; that it happened that way and that it didn't happen some other way. Defendant doesn't have to bring you any evidence -- we brought you quite a bit anyway, and we'll talk about that -- but what did the Plaintiff, what did the Plaintiff's lawyer tell you at that time? Stumbled around and said that maybe Mr. McInnes had had a social drink or two, a couple of beers -- and one of the people on the jury said, "Well, how many is that?" Well, maybe three or four, but they were small glasses, and nothing, and went into the bit about how Yamaha knew about all these things and knew about all these bad things and sent this motorcycle out on the road -- and talk about calling names. Conscious indifference, they want you to believe. In spite of the fact that I think everybody that testified lied for

them, that I had a chance to ask about it.

Martinez, I'll stand on what he told you, that they were good people, that they tried hard to do what was right under warranty and that they even tried harder than the people that manufactured the bike and that if somebody had a special gripe and wanted some brass bushings -- not that anybody has said it would have made any difference in this accident -- they gave it to him. Made a few forks, lifted some guy's feet up off the ground. Remember? And that's what you are going to run

into when you go to offering bikes. The guy says, "They sent me the forks but now my feet won't touch the ground, and I need to know what I can do about lowering the back end of the motorcycle so I won't fall over."

Now, that is not too funny, because think about this: let's say that Mr. Mattioni had that case and the guy fell over and he broke his leg. Now, what's he going to say? Well, he's going to say: why, the Japanese designed this bike and spent two or three years designing it. He's going to say -- and less than a tenth of one percent of the people have ever had any handling. They sent this guy forks, not asking him how long his legs were, not even a stock item, and they altered a bike that they had had below minimum problems with and they

injured my client. Now, isn't that true?

So you have to be careful, and I can see why anybody would want to be careful about --- nobody has said that the brass bushing is more stable than a phenolic bushing. Nobody has told you that. Threethousandths of an inch makes a difference? Threethousandths of an inch?

You heard that goose from California, Nelson, tell you what the clearance was in a cylinder on a machine, and I know there were three people that blinked when he said that, knew he wasn't right. He was just

wrong. If he had a ten-thousandths or whatever it was he said of an inch clearance in a cylinder on the machine, he wouldn't need rings.

So what do they do? What experts have they used? What have they really done? They have gone to North San Diego and they got some guy with a frame machine willing to come to Corpus Christi and tell you in general terms that he thinks that all these bad things can happen. Even though we know -- and they tell you we concealed it -- I guess they are going to tell you we threw stuff away -- but we sure were sloppy about it if we did, because we sent them all this stuff about the wobble complaints.

Then Lawyer Mattioni goes out to California and examines all the Japanese and asks them about what you're going to

do if you have a bike that shimmies like a banana, and they say, "I don't know," and you ask them that a bunch of times, and then you come back and you get, what? Three volumes? Got that much. You examine a person for, what? A day and a half? Two days? And you get three volumes and read ten "I not know" out of it, talking to the President of the company and two or three other people, and if I didn't have a lot of faith that the twelve of you did have what Mr. Mattioni appealed to as commen sense, I guess I could have read

all the rest of it.

But you have been, you have seen these people working. You know, you know what kind of questions they asked. Well, now, assuming that this bike had a frame that flexed like a banana and assuming that you-all knew about it, and assuming that all of your problems were well known to you, and assume this and assume that, what would you do? And that guy -- you know, he's not too articulate in English and he says, "I not know," and then maybe you can make fun of him for that, but you have watched them work, haven't you? You have watched them work.

By the time Hubert Smith got on the stand, you caught them cheating you, representing to you through their offer of testimony of Hubert Smith that that man was a credible honest person that really

saw that.

Have you thought about it? Why, when he was in town, why, when they brought him back on what? The 21st of May to prepare him for this lawsuit, 21st of May. Why? Have you thought about it? Why read his deposition, that he was going along watching the motorcycle, following the motorcycle, saw it put on its blinker, saw it turn to the right lane, saw it fall down on its right side, just like a symphonic composition, fell on its right side before the jiggle tiles, skidded through

the jiggle tiles, hit the barricade, bounced over the barricade. Well, part of that is the same thing Lindsey McInnes said about bouncing over the barricade.

The problem is that it didn't happen. He didn't hit the barricade. He didn't bounce over the barricade, and even Randy Nelson says that he didn't hit the barricade or bounce over the barricade.

The problem with Sgt. Smith is that when the State of Texas sent that nice old dumb guy that didn't know anything about motorcycles down there to talk to him and just asked what happened, didn't try to put a few words in his mouth, suggest to him, you, a little bit, that the motorcycle wobbled, but just asked him what happened, didn't say anything about the motorcycle doing anything, didn't even claim to be paying attention to the

motorcycle; said in his statement that was read to you: I wasn't paying attention to the motorcycle. All I saw was the guy going off the motorcycle.

Let's assume he saw that much, assume he saw that much. Do you have any doubt -- is there any doubt in your mind that that young man, when he got back in the car with the two friends of his whose names he couldn't remember when Bates took his statement -- probably because he had been drinking -- well, he didn't say how much beer he had drunk that afternoon -- but he

had had some, he says -- do you think for a minute if he had seen something -- think about this -- as exciting as his testimony to you: I saw the front of the wheel begin to shimmy, and as I watched it intensely from the other lane as I was going left and he was going right, as I watched it intensely, the shocks began to shake and the whole thing began to shake more and more at the speed of 35 miles an hour -- which challenges the credibility, to think that this piece of iron here without a bad weld in it somewhere could do anything like that with no flat tire, the shaking -- and then the handlebars began to shake and I saw the handlebars tear out of Linday McInnes' hand -- he told you under oath -- and those lawyers read that to you so solemnly, reading so softly that you could hardly hear them.

And they told that to you as Gospel truth. And they told that to you for what reason, my friends? They told it to you on deposition for what reason? Because they didn't want me cross examining Sgt. Smith until you had heard all these papers about wobble.

Now, I find myself in this court defending a motorcycle retailer, motorcycle distributors that they are trying to stick with designing the bike. I find myself here not with a jury of their peers at all, as we heard from a long way back, that the American system

is supposed to be -- I have found myself many times defending a doctor or two, wishing I had a doctor or two on the jury. And I say that to you only to explain to you why they did that with Smith, why they didn't bring him live while he was sitting around waiting to come, waiting for his big chance on stage. Because they wanted you to hear Smith's testimony that he machine began to wobble and the forks wobbled and it got torn out of Lindsey McInnes' hands and they wanted you to hear that while you heard four days of testimony being read about what? About what? About evidence that was offered to you, and the Judge, time after time instructing you: you can consider this only for notice to Yamaha.

It's a strange law, isn't it? Isn't it hard? How in the world can you go into

that jury room and forget all about Sgt. Smith telling you all that stuff that nobody else says happened, and forget about poor old Mr. Benson, and all his problems with his Yamaha here locally, that has not caused any problems since we got Mr. Benson off of it and he quit reading those articles that they have.

And how do you remember when you go in to be fair to my client that there are at most two of these that had anything to do with the frame, with a bad frame, with a repurchased frame, with something that

might even have been -- apples and oranges, isn't it? Sixty-five thousand bikes in four years. Sixty-five thousand. But it's hard to put into perspective when you look at that many wobble complaints, isn't it?

Let me help out a little bit. Is there anybody on this jury that hasn't ever done a bad thing? Well, let's say just made a mistake, not a bad thing. Reading the Charge here this afternoon, we left out a page in the Charge these wonderful lawyers from Philadelphia and the name-callers representing the Yamaha people and this fine Judge. We left a page out, and we know -- we know that human beings are going to leave pieces out of motorcycles, aren't they? Not because they like to leave pages out and stumble around, and it may make us look dumb. But

we don't leave pieces out of motorcycles because we are incompetent, careless and headless and reckless disregard to the rights of others. We do it because we are human beings. We do it for the same reason that anybody else makes a mistake.

Let me get back to my 65,000 motorcycles and thinking about those days in your life that may not have been perfect days, which with Murphy's law, if something can go wrong, it will. That's as true as anything in the world. If something can go wrong, it will. Sixty-five thousand motorcycles.

Well, let's see, in ten days -- well, not in days -- in years, that's a hundred -- that is almost a hundred and eighty years. Now, who is so perfect, who is so perfct that they don't expect at least more mistake than that?

Talk about name-calling. And he says I'm name-calling. That must make me a bad person and that must make Yamaha bad. Is it right to take little bits and pieces out of somebody's deposition and put them "I not knows" together and try to make bad people out of them? Or is every single thing that you have seen my people try to do consistent with caring, like Ray Martinez said, consistent with attention to the needs, the problems, the desires, the frailties of other people. You take a little bit, take a little bit out of your life, out of your life and your life and

your life, and you find 25 bad days. Does that mean I have got a jury of 12 ugly, indecent people that don't care?

Like they got to telling you: charge them fifteen million dollars -- he finally said it in a voice I could hear. Is that right? To take 25, 30, 45, 50 days out of 180 years and try to hurt somebody? That's all they are doing. They are down here, down here asking for sympathy, parading sympathy to you just every chance they get, so sick I'm not sure there is any way

you can avoid it. I'm just not sure that you can follow the Court's instruction and make them prove by a preponderance of the evidence that that bike was defective when it was sold.

What does "defective" mean? Unreasonably dangerous within the time frame there -- you have the definition there, and you are going to get to take a copy of this into the jury room with you. You'll have that.

Do you wonder what Tony Murphy told them? I did. Tony Murphy made a big, grandiose presentation to Gordon Jennings. Tony Murphy was there, wasn't he? Yes, sir. Watching you come off the curve, wobbling at 160 miles an hour -- whatever in the heck he was doing, 140 -- Tony Murphy did this, and Tony Murphy did that. And who knows?

Well, they got a picture, a picture in evidence. Tony Murphy and his partner, who is an engineer, looking at the machine. Now, why did they want to prove that up? To make my guy -- to show my guy didn't see that dust off the covers, and as bad as far as seeing dust -- I don't know; we've got enough dust down here in Corpus where I guess if it was a couple of years, he missed the dust. Big deal.

But what did they prove? That they had two

experts that my witness Jennings recognized as competent as efficient, as knowledgeable -- and what do they do? They sat around. They came in, they said, to help them cross examine. You watched. He really helped a lot, didn't he? Punched him a couple of times, kicked the tires for him. Or were they just wondering if Allison was gutsy enough to call him as a witness and see what they really had to say? Do you wonder about that?

I wonder in seven and a half -- you know, they had this motorcycle seven and a half years.

What have you heard it would take to make it run? Almost nothing. You wouldn't have to change anything. Martinez told you, Gardlin told you, I don't know what the guy in the frame shop,

the frame bending machine told you, but everybody that has really spoken to us says if it's going to wobble, it's going to wobble.

You know why they didn't take it out to see if it was going to wobble? Because it won't wobble. Won't wobble. It won't wobble. It won't wobble. Like 99 percent of them, it won't wobble. And they have to prove their case by a preponderance of the evidence. And they come in here after sitting on this thing seven and a half years with two super experts from California, and they bring you some goose from a frame shop, you know, none of the qualifcations of the people that they

left sitting there and sitting out in the hall, to tell you: well, it might wobble, it might. I don't know why, but it might.

Didn't measure anything, didn't mike anything except watching Gordon do it. I guess he figured out from watching Gordon do it. Is that right? And then come in and call names, come in and called names and say we are bad people. Ugly people. Punish them. Show you a hundred wobbles, 99 percent of which have nothing to do with the frame. And you lied about it. You didn't tell Lindsey McInnes.

What did Lindsey McInnes tell you himself? He said he knew about wobble, has had bikes that wobbled, had been on bikes that wobbled. Page 181, he said: "Various bikes do wobble. Different bikes throughout the world, English bikes or German bikes, whatever they might be.

What would we tell Lindsey McInnes in this elaborate scheme to defraud him that they brought to your attention on opening argument, what would we tell him that would prevent that? Would we tell him -- would we lie to him? Would we tell him that bike could wobble below 40 miles an hour? Nobody believes that. Not even the two experts they sent home.

Would it make any difference to what

Lindsey McInnes did in buying the bike? No, because he knows various bikes throughout the world will wobble. He told you that. Told you that in deposition. Told you that when they brought him.

But why did they bring him up here? I would have been content to read Mr. McInnes' deposition. Why bring him from Connecticut, if they are going to read his deposition -- and then they don't want to do what I suggest: just leave him there. I'll read his deposition.

What did they do? Just bring him up here and dump him in the middle of the floor. And they call me callous? They call my company indifferent? Or, as you may suspect, is that just a slight tinge of sympathy? What were they hoping? What were they hoping? They were hoping that they would scare us so bad that we'd

say: we don't want to ask Mr. McInnes any questions.

As long as he's here, I might as well ask him some. Was I ugly to him? Was I bad to him? Did I say something I shouldn't have? Only suing my client for ten or fifteen million dollars. Probably shouldn't ask him any questions. And I called him names. I don't know.

Let me back up a little bit and talk about the Charge. I know I promised you -- have I been talking half an hour already?

THE COURT: Yes, sir.

MR. ALLISON: Time flies when you're having a good time, but I really didn't think I had talked that long.

Look, the Judge tells you in the fourth sentence that you are the sole judges -- and that means you are the only judges of the credibility of the witnesses and the weight to be given their testimony. Now, what does that mean, my friends? And you-all -- well, everyone knows it from your life, your daily lives, from your contact with other people, from just living in the real world, that there are people that for whatever reason -- Lord knows what the reasons are. I suppose the reasons are as many and as varied as there are people. They are not accurate. I had an old cowboy friend who used to call it -- he'd never say lie,

he'd just say somebody was reckless with the truth. I love that. Reckless with the truth.

And there are people that are reckless with the truth. There are people that will lie, too. But there are people that are reckless with the truth, and that's why the Judge tells you that you are the sole judges of the credibility of the witnesses.

Now, you don't have to go in there like a machine, like little automatons, going around and saying

he said it wobbles, so it wobbles and we are going to go and say it wobbles.

They bring out enough wobbles -- whatever happened to my wobble chart? Plug these into a machine: wobble, wobble, wobble, wobble, wobble, wobble, and we only have one witness that said it didn't wobble, so you are going to come out with an answer that says wobble. Especially if they put the guy on the stand by deposition Monday and read to you for four days and all you hear is wobble, wobble, wobble.

It's tougher to pay attention to what the Court says and pay attention to the evidence of whether that bike wobbled, whether that bike was defective, whether that bike did what they said it did below 40 miles an hour. That's just bull. And I don't care where you're from or where

you get your evidence from, I don't think you can come to Corpus Christi, whether you are a Philadelphia lawyer or who you are, and convince 12 people that you had a bike for seven and a half years that you claimed wobbled and that you didn't take out on the road and drive, when you've got two experienced motorcycle people sitting out in the hall for two weeks, and you've got a picture of them standing by the bike in years past. And they don't want us to.

No, you can't take the bike. It's our bike.

Can't do it. Ho, Ho, you sold it to us and we're not going to let you test the bike.

That isn't funny. They're trying to steal money from us.

MR. FLETCHER: Pardon me, Your Honor. I belive we have gotten into an area that the Court ruled on earlier. It was the Court's ruling concerning whether or not --

THE COURT: I will sustain the objection, and the jury will be instructed to disregard the last statement of counsel.

MR. ALLISON: Well, anyway, we sure haven't got to take the bike out, have we? Is there any doubt in any of your minds that Gordon Jennings would like to go out and run the bike and see if there is anything wrong with it? And you know

why we haven't: because Tony Murphy and that other guy that know what they are doing know that it won't wobble. It won't wobble. It won't wobble. Like 99 percent of them, it won't wobble. It won't wobble at any speed. But below 40 miles an hour?

Well, I think that has something to do with credibility, and I think the Court is telling you that if you think that they are trying to pull the wool over your eyes, then you don't have to believe anything they

have brought you. I have tried to show you that they are so -- you know, there isn't anything that Smith says that is even like what Lindsey McInnes says.

I want to suggest to you that Dr. Martin is correct, that when he talked to Lindsey McInnes in the emergency room, when he had amnesia for the accident, why would he lie about that? Why would he lie about that? And that as time went on, he has no recollection of Lindsey ever telling him that he remembered anything; that it has been his experience that all people who have no memory of an accident never regain that, but some people think they do as a result of some people telling them what they think might have happened. Now, that is logical to me. Is that my witness? That makes sense to me.

What's his example? If you are in a fight, you may remember that you got knocked out in the second round, right? You may remember that, but when you wake up, if you don't remember the punch, you never will. Now, some people wake up and they remember the punch coming, but if you wake up and you didn't remember the punch, when your pal said: why in the world didn't you duck when he started that roundhouse right? Didn't you see it? Then you start thinking about: well, maybe you saw it. But he says a hundred out of a hundred people,

nobody would be -- it would be like a textbook thing if anybody ever really remembered.

Okay. What I'm suggesting to you is that Lindsey McInnes has no memory of this accident except as perhaps in all of the times -- we know his lawyer was talking to him within a week or two, within a week or two after his accident, he came down here, arguing with Mr. Holmes, who is so bad. What did Mr. Holmes do that is so bad?

I realize that I am digressing.

They jumped all over him because of his notes, which is in evidence, but tell me, why would they subpoena Charlie Holmes down here as a witness, having a letter that says whatever it says, if they didn't want to use him as a witness? I imagine I would never have seen that letter if they had brought Charlie Holmes down here and

he decided to cooperate and remember just a few things. Like Mr. Smith told them that the bike shimmied, right? But what did he tell him in the statement? It's not a garbled statement. What do we know about the statement? I was really tricky. I gave him the statement, I gave him the recordings, they took the recordings and played them for the people, and they had an expert look at the recordings.

Now, do you think, talking about calling names,

do you think if they had anything on Bates that he had been tricky with you or unfair with you or misleading anybody like they tried to tell you -- I went over to Bates' room, what, 10:30, 11:00 at night and a nice old guy, didn't know anything about motorcycles, played a recording for him. Now, if there was anything at all helpful there, if their expert can find anything, if there was anything bad on Holmes, do you have any doubt that if Charlie Holmes, in that statement that they played and listened to, had said one thing, one thing, my friends, that he didn't tell you after being subpoenaed by them and put on the witness stand -- just come in. Find some chairs up front. You can hear better there -- that they would have played that point. They would have asked him about it. But, no, they just wanted to jump on him for nothing.

Did I select a policeman who went out there and investigated this accident? Is it ugly of me to put on somebody they subpoenaed? Call me names for that? Am I bad because I thought it was important that you hear that the officer who investigated this accident couldn't find anywhere that the guy hit the guard rail, found where he had run over the curb, apparently went straight ahead through the jiggle tiles and off the embankment, running over the reflector sign, as he told you.

Talked to the witness Smith, who said he didn't see much, but knew that there was no motorcycle malfunction. Now, that's the day, the day of the accident. Don't you know, don't you know when Lawyer Mattioni was down here arguing about whether they could find some glass in the jiggle tiles, that Lawyer Mattioni found out whether or not Smith had said there was any motorcycle malfunction. Now, seven and a half years later, after talking to them 18 times and being given a little money for a ticket he already had and a little money to go home -- which is something, of course, that Mr. Mattioni doesn't do, we learned earlier -- the guy changes his entire story, sees him shimmy, sees him fall down before he gets to the jiggle tiles, even though he said in the statement he had no -- didn't even see him

before he got to the -- didn't even see him until he got past the jiggle tiles.

Did you see him run across the jiggle tiles?

Answer: I really wasn't watching that close.

Now he says he followed him all that way. Told him in the statement that Lindsey was going 50. We read all that to you. He says now he's going 35 when he hit.

Said in the statement that Lindsey was very incoherent. Very incoherent in his talking, almost like a drunken stupor -- and he comes on after talking to

these people for seven and a half years and says he was coherent and wasn't drunk at all, and I didn't smell his breath and certainly didn't seem like he was in a drunk stupor. And reads that to you. A lawyer reads that to you, knowing that that man said just the opposite in speed and drinking and whether he was watching him. Credibility?

How does that sit with you when you know that they put that man on knowing that that had not been his observation and had not been his experience and had not been his belief, and represented to you under oath while they sat around and read four more days of wobble, wobble, that that was true. Just bull. Just bull.

Did you give a statement to the police?

Yes, sir, sure did.

He told them there wasn't any motorcycle malfunction. What did you tell them?

That the guy just drove straight ahead. It was just like he was going on a straight line, like he had no idea which direction it went. His bike just went in a straight line, and hit the guard rail as I was coming off and he was flying over.

Well, they teach us in law school that this is the landslide theory. If you get a jury mad enough at a defendant by whatever means you can use -- and you

know that is in your personal experience, that if somebody can get mad at somebody, sometimes you don't listen, do you? Put on Sgt. Smith about all that terrible wobble and and lost control and falling down. He didn't fall down. Even their own expert says he didn't hit the guard rail, didn't slide across the jiggle tiles, no evidence at all that he skidded across there. But if you get mad enough at us the first five days, you're not going to listen. You're not going to be reasonable. You're not going to decide it on reason; you're going to decide it on emotion, putting all those wobble, wobble, wobbles out on the road.

Lindsey McInnes, even in his deposition -- I won't read it to you -- said that he never lost control of the motorcycle. And let me back up a

minute. You know that the State, you know that the State was one time party to this lawsuit. What is the case against the State? Why did they leave the first day? Have you thought about that? That really tells you a lot if you think about it, because, you see, they can't have both, can they?

But Lindsey McInnes' deposition will support both. If you read from one place, he says the car that passed him on his right, that Mr. Smith didn't see, crowded him into the jiggle tiles, and he marked on that

thing. Then remember all the things that we read out of the deposition? In other words, there is a place that fits in with their theory against Yamaha and there is a place that fits in with their theory against the State. But both of them can't be true, and they couldn't hope to landslide a jury so badly with all the other accidents at that place, even against the State, so what do they do? They flip a coin and chase Yamaha. Because why? Why would they do that?

Well, because in '73 and before, as now, every manufacturer of every motorcycle in any country anywhere has got warranty complaints dealing with wobble, don't they? Everybody told you that they had wobble. Every brand. Some of them are a little looser, a little more banana-like than others. Some of them are a

little tougher. But you get wobble complaints out of all of them.

Suppose this had been a Triumph or a Harley that is supposed to have had a little weaker frame. Wouldn't they have had just as good a case? All kidding aside. If that had been a Harley-Davidson, they are supposed to have the worst frames, or a Triumph, somewhere in between. If it had been a BMW, they'd probably pick up a couple of hundred wobble complaints out of 65,000 sales --

MR. PLETCHER: Excuse me, Your Honor. I believe we're getting outside of the record in this case, and I object to counsel going outside of the record, talking about something that is not in evidence.

MR. ALLISON: Every expert that has testified said the BMW frame is the stiffest.

THE COURT: I will overrule that objection.

MR. ALLISON: Wobble, wobble, wobble. You have been hearing it for four days. Mr. Smith would get up and he'd tell you all of this tale that he saw, and you'd hear wobble, wobble, wobble, and the Judge would tell you that you can't pay any attention to that as to whether that motorcycle wobbled, but by the time you got through hearing it, the old landslide

theory is proven, and you don't turn everything else off. Mixed thoroughly with sympathy, mixed with recriminations, with threatening to kill people, with lose face. Don't you just love that? Who do you suppose figured that out? It was the Japanese, of course. We all know from the World Warr II movies that the Japanese don't want to lose face.

But what they forgot is that when the guy says that they were thinking about that, that very time under their testimony, it takes two or three years to develop a bike and engineers to put it on the road, so at that very time they must have had one on the way, which is

represented by the '74 bike, which also has wobbles in it. Not as many. It's a better frame.

Did I start this lawsuit telling you that we had a perfect motorcycle, or did I start this lawsuit leveling with you that, like anybody else, we have made mistakes. We have made some bad bikes. We have bought them back. I don't know whether it's 15 or 25 of them; that we have had some complaints of wobble, most of which had nothing to do with the frame, and the other 64,850 bikes, most of which are still on the road, are not wobbling. Do not wobble. Some of them wobble at very high speed.

That's not what they claim in this case. They claim something, that without a broken frame, that without a bad weld, that without a misalignment, that without

a bad bearing or something else wrong, there is no way.

Tony Pletcher over there is my friend, and he's younger, and he's going to close this argument. I know he can go over there and lift that. You see, that's a pretty heavy frame, and I guess we could have gone to all the trouble of bringing the '69 frames in that were what? Twelve pounds lighter?

Improvements are natural. In here, you bolt a motor, which is pretty stiff. Pretty stiff as far as

flexing. Look down there. You can see if it's flexed anywhere, can't you. Those of you who deal with machinery every day know that if you get a wobble or a shake on something, it's going to loosen some bolts or it's going to do this or that or the other thing, and that motor in there made it pretty stiff. But without that, I'll bet you can't put that frame in a press and use it, anything within the coefficient of friction of either one of these tires and make that frame deform.

People peddle bicylces 40 miles an hour. Bicycles. That's so much -- the incredible thing to me about this is that they have two things, one of which they left, what, a whole piece out of the back of the swing arm, and it happened at 35 to 40, and they are so proud of that, and this guy they bring from his farm, who

obviously had a bad motorcycle, they brought him all the way from North Carolina to tell you what I have been telling you for about two and a half weeks, which is that they made some bad motorcycles. But that wasn't one of them. That wasn't one of them.

We'll have a motorcycle building party whenever we get through with the case. We've got enough pieces.

Well, as you look through those memos, you see -- well, we've got a breakdown over here. Most of them, 99 percent of them speak of speed wobble.

I want to talk a little bit about the test. You know, they jumped all over me for that. I can't figure that out, because I didn't take either one of those tests. I was not sitting there with Lindsey McInnes at the beer joint waiting for his motorcycle to get repaired, drinking beer and shooting pool. I do imagine that a couple of weeks after the accident a lot of that information would have been available, had we known about the event at that time. It might have been a little fresher in the minds of the people when he went over to the motorcycle shop to pick up his bike. I wonder how many of them there said: gee, I wonder how far he's going to get before he falls over. I wonder. But that's all lost to us, lost to us now, because of the length of time between when we knew anything

about this and the trial. Oh, well, they jump on me and say I'm calling Lindsey names. I said it seemed like a lonely life to me, didn't I? It did seem lonely. Got to thinking about that one evening, and I said that we don't know very much about what Lindsey McInnes did, about what his life was like. We know he got up at noon and dropped his motorcycle off and started drinking beer. That sounds lonely to me, my friends. That sounds lonely. That does not sound, as they suggested through their experts that didn't trat Lindsey, that didn't

sound like a man trying to live life to the fullest. It sounded like a man running from himself, a lonely man. What did Mr. McInnes tell you about that? The only thing in his argument that I agreed with. I wonder if this was a slip when he told you that the only thing Lindsey McInnes really loved was his motorcycle? Remember, he told you that? I think that's true. I think that's lonely. Hadn't seen his wife in what, a year, year and a half, when she died? Didn't go to the funeral, hadn't seen some of his kids in a year or two. Who heard from him? One postcard since he told the United States District Court in 1972 that he could never ride bikes again and wanted three hundred thousand for that, however much it was. He told them he was totally and permanently disabled. Told the Court

that. Wanted them to believe it, don't you think? And what was he doing? Riding his bike all over the country.

Credibility? How does that sit with you? Who was the lawyer that signed that while Lindsey drove his bike around all over the country? Lawyer Mattioni. His name is right on it.

Want the people in the federal court there to believe that he can't ride a bike and ought to get a lot of money for it, and he's riding his bike all over. Put 20,000 miles on the bike from that time to the time

of the accident. Credibility? Little reckless with the truth? Make you wonder if calling me names is right or if it's right that some of this is contrived? Make you wonder? Make you wonder?

I know I started to talk about the booze tests. Dr. Rupp, who is our County Medical Examiner, told you that he thought anybody driving any kind of vehicle would be impaired at .05. Now, that is a knowledgable man. That is a man with some training, a man with some background, a man that is not a man I selected. That is not a man I had anything to do with. And he told you that in his opinion, based on the .131 that Lindsey McInnes probably had a blood alcohol -- I don't know where my exhibit is now, but -- oh, yeah, looking right at it. Can't see it. And I haven't even had a beer -- that at 5:00 o'clock

p.m. he probably had .016, three times what Dr. Rupp -- that is not my witness. That's just somebody that happens to know and happens to do this sort of thing for a living, helping the State of Texas protect us from drunks. And he says that .05 is impaired, at .05 he wouldn't have any doubt that he would drive straight off the curb, would drive straight off the road.

Do you think I put ..m up to that? Did I buy him? What did I promise him? That I'd be a good boy if

he would come and say that? Or that I'd give him money? Or did he tell you that because it's true that .05 is impaired, and .05 is about what he would expect.

I forget who I even asked that if you had a hundred motorcycles that had had six beers coming at you above that curve that weren't familiar with it, would you be a little nervous if you were sitting in the place where he ran off the road? Shoot.

But what does Dr. Rupp say that McInnes' blood alcohol probably was? .016. By golly, that's got to be plenty drunk.

Now, what does he use to substantiate that? The guy tells you that he quit drinking at 4:00 o'clock. That's what he told you when I asked him. But what did he say in his deposition? When he picked his motorcycle up at 3:30. Remember we read you that?

And I know that his testimony is as flexible and as variable and as tailored to fit anything that we need to prove. I don't believe he remembes -- two places in that deposition we read to you he said that he replaced this front tire. Why did he tell you that? That's not important. Why did he tell you that? Because he doesn't remember. Because he doesn't remember.

Why did he tell you he hit the guard rail even

though obviously he didn't? He didn't go over the guard rail with that motorcycle to skin up the front of it any more than he did. Why did he tell you that? Because he doesn't remember.

Why did he tell you he still had control until he hit the guard rail in his deposition when they have a witness that is going to say that the motorcycle fell down before it got to the white tiles? Because he doesn't -- I'll tell you. Because he doesn't remember. He doesn't remember.

Now, at 5:35, an enzyme test, which is the most reliable of all tests, was run on some kind of a machine, and it had .131. That is consistent with .016 at that time, and it is precisely consistent with Dr. Martin's observation. Was Yamaha there guiding his hand, making Dr. Martin

write down that at 8:00 o'clock, four hours after this man quit drinking, he was still slightly intoxicated?

What did we do for Yamaha to make them do that? Promise him a motorcycle? Promise him we won't do this or that? Why would they say that if it wasn't true? They're going to tell you: oh, Dr. Martinez knew what he was talking about. Just came down here and wrote "slightly intoxicated" down, but that's not

important. Not at one thirty-one. That doesn't mean anything.

We tried to explain a little bit about the relationship between the tests, because that puzzled me. It did, how the State test could show .09 and when this one thirty-one test is more reliable or accurate, and the State doesn't use the same thing any more, but the witness said and it's true that no matter what the top, the third number would be, we rounded off to the one below. So it could have been .99. That's what he said. That in the alcohol distillation process, that -- and something else, you can lose as much as .02 in one and .01 in the other, which if he's right about that -- and I don't know if he's right. I didn't take these tests. I didn't make these tests, and I didn't hire the people that did them; I'm

just looking at the results like you guys are. But if you put that error factor that he says is one reason why they don't do that testing any more in here at 5:35, .0136 or 7 or something like that, wouldn't it be, and it would fit in pretty good with the one thirty-one and still a little drunk at 8:00 o'clock.

Now, no matter how you figure it, if he started drinking at 2:30 and was still a little drink at 8:00 o'clock, he had a bunch more than six 8 ounce glasses of domestic beer.

Have you thought about the thing that goes through somebody's mind about whether or not they are

going to tell the truth and all the truth and the whole truth and all of that? The guy wondered, well, I wonder if they have somebody from the tavern, if they have the people that ran out of the tavern or the motorcycle shop and begged me not to get on the motorcycle. People, all the people that smelled how I smelled of beer.

Now, if you don't tell the truth about it, and they bring somebody in -- yeah, I remember tht guy. He had 17 glasses of beer.

If you figure it, that's about what he'd have to have to still be a little drunk at 8:00 o'clock.

But sympathy is tough to overcome, isn't it? And I know that. And I want to suggest to you, outside of all the pain and outside of all the ugliness, sometimes it helps to get things in perspective to turn it around.

hour. There is no way he is going to sell that defense to you.

But what's the difference? The difference, my friends, is in my client's favor. And I wonder if anybody even cares. Since we are dealing with a bad cripple suing a motorcycle company -- it's just Japs -- do you know what the difference is? In the cripple suing Mr. McInnes for being drunk on his motorcycle and straightening out the curve and running off the road, that guy's got to prove his case. He has the burden to prove his case. McInnes doesn't have the burden to

prove anything. They have to prove that he did something wrong. And the reverse is true in this case. McInnes is the one that has to prove what he says. And it is contrived, and it is made up. And I don't like it.

My friend Tony, we'll go fishing next week. I'm not mad at him. You can see what he has had to do with this. Nothing.

But they made that up. I don't know how they got Smith to change that much. I don't know how they got Mr. Consumer to come in here and say that they bought his motorcycle back and all this other stuff, and I don't know -- I don't know a lot of things. But they are going to brag on all the things I don't know in a minute when they get a chance to close the argument -- but I know that if this was reversed, there is no way you would buy this as a

Instead of these oppressive, hate-Yamaha, kill-Yamaha, go-get-'em team -- we're going to be a team. We're going to go get'em, aren't we? We're going to teach them a lesson. But the rest of it?

What amount of money if paid now in cash? Well, I'll say that if you thought that a total of a million dollars in every respect, and you know, you have to answer this, no matter what you think of their proof of a defect on that motorcycle -- and I hope you don't think for a second that I think my people had anything to do with this accident, but I am obliged to talk about

it with you.

If Mr. McInnes were awarded a total of a million dollars at current interest rates -- and they may drop some -- but at current interest rates, it says paid now in cash, that would give him $180,000 a year -- or whatever the interest rate is -- and he'd still have the million dollars.

You may think I'm way out of line. And you know I'm a light-hearted person. I know you know that, and you know that I'd rather joke about something than be serious all the time, and maybe that's because I see things too seriously. And I feel for Mr. McInnes. A lot of people that joke and try to take things lightly like I do may be hurt more inside than they show, and a lot of people are just the opposite. Some people tend to be very

Suppose we use the same facts. Suppose somebody had been going about their business down here at the curve. Let's say, you know, the guys with the State come around and pick up the debris or some of the people that we see picking up cans on the side of the road. We know people are not nice sometimes to our roadways, throw cans out and other people come around and collect them, and we are seeing them all up and down the road. Let's say we have some State people or some can people

out there in the road going along with a sack of cans on their backs, and Lindsey McInnes had come flying off that thing, knocking the guard -- the reflector post down, and run over somebody, crippled them, hurt them, injured them. No matter who they were. Let's say that person brought a lawsuit against Mr. McInnes. Same facts. I'm not going to change a single fact, not a single fact, and let's say that that crippled person says that Lindsey McInnes, we have evidence that you have, by the most accurate system that Memorial Medical Center laboratories can devise, a blood alcohol of .131 -- 0.131.

Let's say that the evidence comes in through Dr. Rupp -- not somebody that the injured person hires but through Dr. Rupp, who says that nobody ought to drive with more than a .05 -- and I don't remember

what he said about a motorcycle, but he put that between airplanes and cars -- and in my opinion, Dr. Rupp is going to tell this same jury that there is no way that that man should have been driving a motorcycle with that blood alcohol.

Let's say that Mr. McInnes' defense is -- and our hypothetical, we have to assume that he didn't get hurt so there will not be any sympathy for Mr. McInnes, because of this cripple that is suing him --

Mr. McInnes' defense is that his motorcycle wobbled uncontrollably below 40 miles an hour, brings you a witness who conflicts in totality with a statement that he has biven the police and the State of Texas. Everything he says in it is different. But he brings you a hundred and twenty-five wobble complaints, and his lawyer runs about reading wobble, wobble, wobble for four days. As a defense to that lawsuit, even though he has had a witness in Mr. Tony Murphy and that other guy ready here in town from California, knowledgeable about wobble, who they don't put on the stand, and he brings you some frame bender from North San Diego to try to get out of this. You guys are going to laugh him out of the jury room. There is no way that you are going to believe that that motorcycle wobbled under 40 miles an

defense for Lindsey McInnes hurting somebody else on that curve.

Let me talk --

THE COURT: You have ten minutes left, Mr. Allison.

MR. ALLISON: Well, the first question asked you is if the motorcycle, when we sold it, that that frame of the motorcycle -- it says that motorcycle -- was defective and they have the burden of proof to prove

that, and they have fallen so far short of any other -- with anything else except sympathy, I don't think it would take -- if this were reversed, my friends, it wouldn't take you 35 minutes to answer these questions. Long enough to read them and answer them. I'm not sure that --

It's an amazing thing. You have 12 people on a jury that can't talk to each other about a case, and it's amazing, and you get back into the jury room and the restriction is lifted, how much you are going to find that you see it the same way. You're going to be surprised about that. I know it's taken two and a half weeks for you to get a chance for a shot at that experience, but looking back, tht's going to be interesting to you, I think.

Was it a producing cause? Did they prove that to you, really, with all of the malarkey, with the wobble complaints?

I'll tell you what: if we hurt that guy from North Carolina, it would be a different lawsuit, wouldn't it? I know the Judge told you you can't think about that, but whether this frame was defective, just notice. Like I told you in opening argument, that we had notice.

I think that their witness told you that Martin, Dr. Martin said one hundred five thousand medical would

be reasonable in the past. That is what they have proved, and I guess that's right.

If you believe he has the kind of life expectancy that they tell you, although I hardly see how that is possible, then twice that under Dr. Martin's testimony would be right.

If you want to compromise it just a little bit on the future medical, it seems to me that $500,000 for all the future medical? That sounds like -- you know -- according to their expert, you can invest that now and the Court asks you what amount of money paid today, if paid now in cash -- and they bring interest in to you, 18 percent, that's $90,000 a year in interest, and he still has the $500,000. You can do a lot with that.

short of sincere and all tht sort of thing, and don't care about anything.

But I feel for Lindsey. I don't think we had anything to do with hurting him, but they have come eight million miles from proving it. But I've had a lot of cases on the other side where I represented somebody that was hurt, and I don't know that you'd find another defense lawyer that was as up-front with you. But a million dollars paid now in cash? What's the Court asking? A hundred eighty thousand dollars a year?

That sounds like plenty. Plenty to me. Okay.

If you believe that bits and pieces stuff that they fed you and you believe that my people are ugly people, then you answer the rest of the questions against us. I don't think anything my people did hurt Lindsey McInnes, whether we had a Harley-Davidson or whether we had a Kawasaki or a Triumph or a Norton. The blood alcohol level he had, whatever he was riding, it was going to go off the road. Cars do it all the time, lot less than that.

I think it was a hundred percent his fault. I know it's a hard thing to make you see, and I appreciate it's a hard thing. If you don't see it my way, you're not going to find me unhappy about it, because I know people see things different

ways. I see it in the way I told you I see it.

If I have offended you, then I have not offended you in behalf of Yamaha; I have offended you on behalf of me. I'll be around when you come back, chase me in the hall and whip up on me, but I don't want you to take it out at all against my client.